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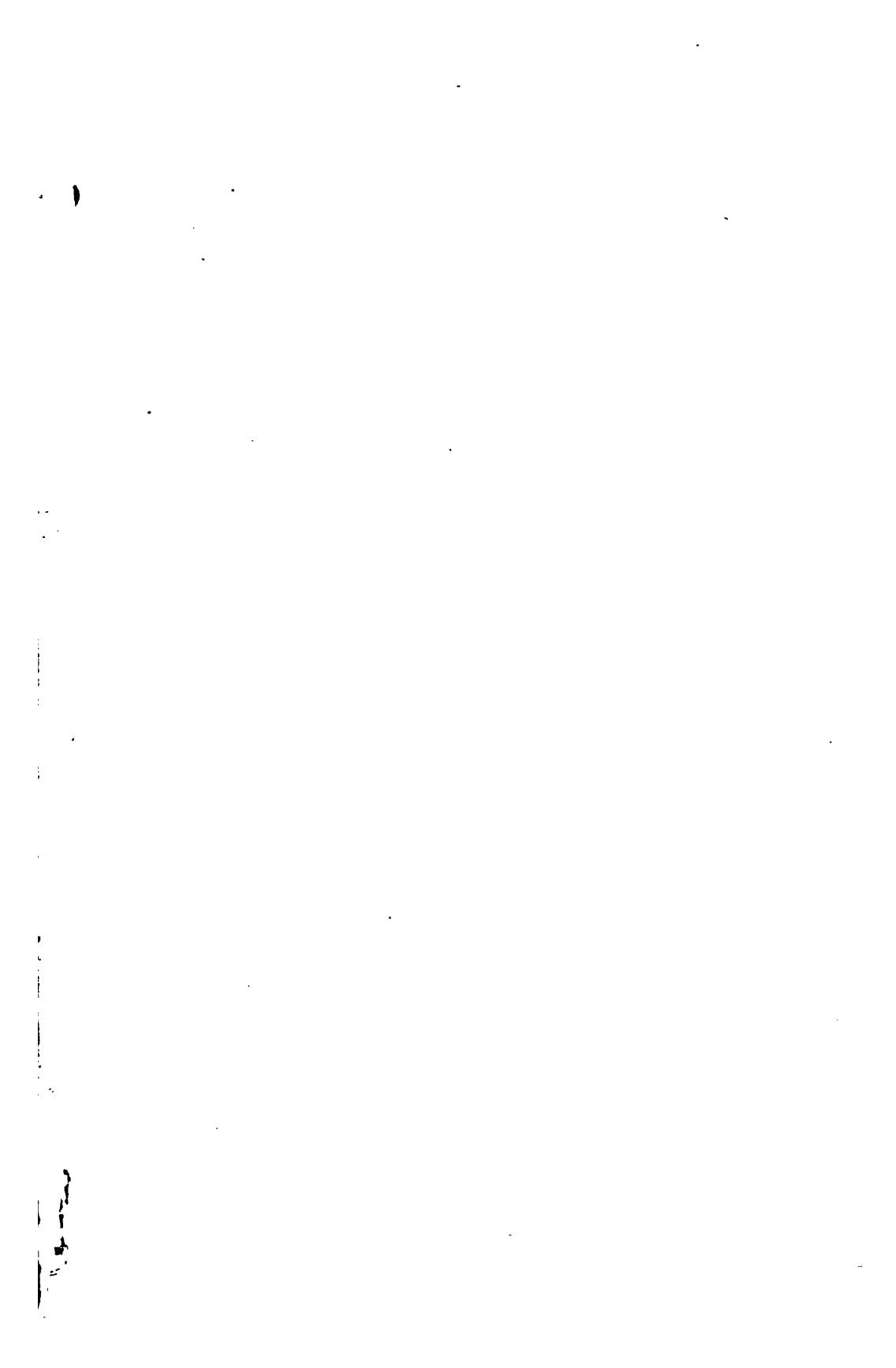


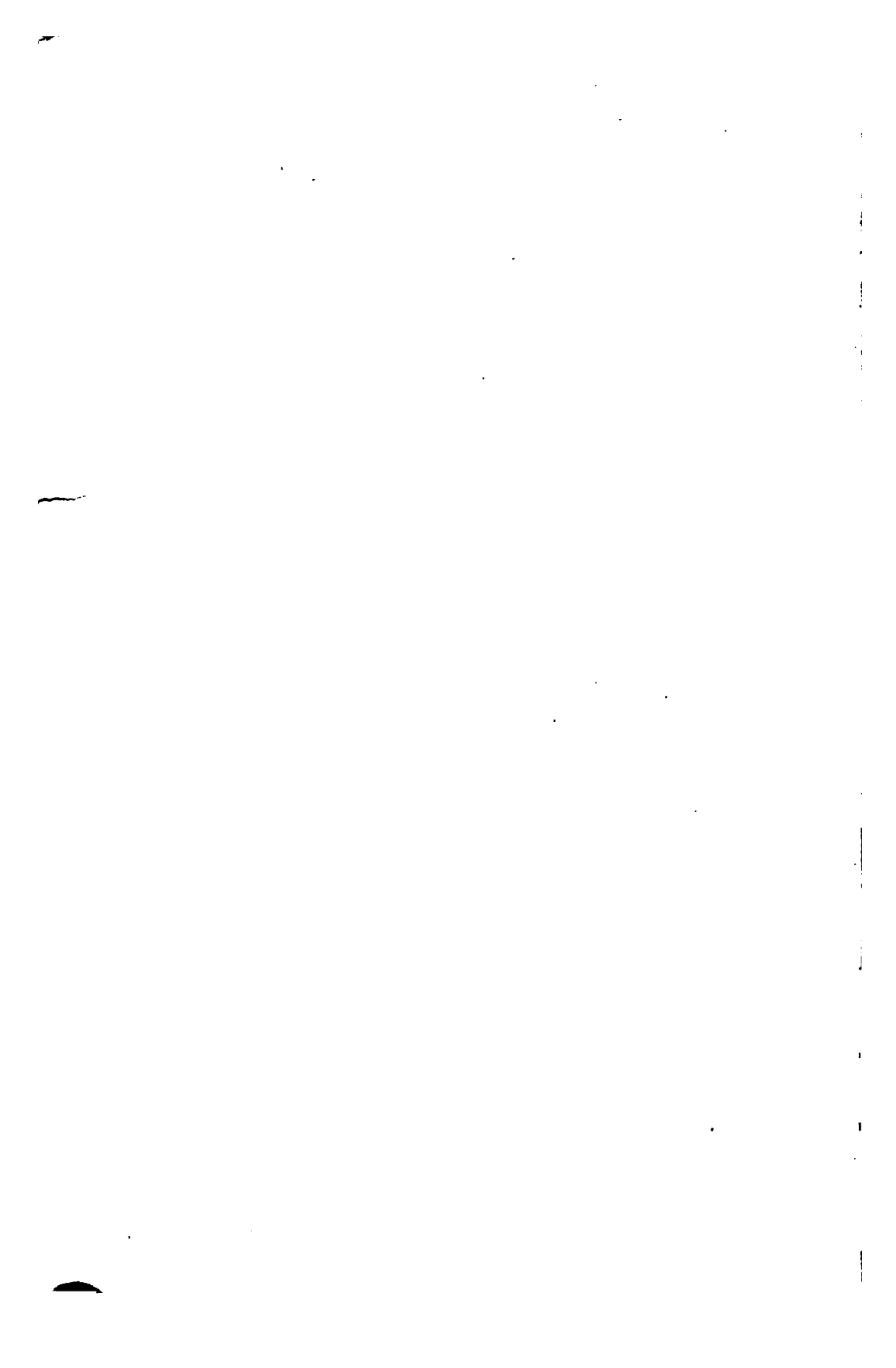
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# REPORTS

OF

CASES ARGUED AND DETERMINED

IN THE

## Supreme Court of Judicature

OF THE

STATE OF INDIANA,

WITH TABLES OF CASES REPORTED AND CITED, AND STATUTES  
CITED AND CONSTRUED, AND AN INDEX.

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CHARLES F. REMY,

OFFICIAL REPORTER.

JOHN W. DONAKER, Ass't Reporter.

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VOL. 148,

CONTAINING CASES DECIDED AT THE NOVEMBER TERM, 1896, AND NOT  
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JUDGES  
OF THE  
SUPREME COURT

OF THE  
STATE OF INDIANA,  
DURING THE PERIOD COMPRISED IN THIS VOLUME.

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HON. JAMES H. JORDAN. \* ‡  
HON. JAMES McCABE. ‖ †  
HON. TIMOTHY E. HOWARD. †  
HON. LEONARD J. HACKNEY. †  
HON. LEANDER J. MONKS. ‡

\* Chief Justice at November Term, 1896.

‖ Chief Justice at May Term, 1897.

† Term of office commenced January 1, 1898.

‡ Term of office commenced January 7, 1895.

OFFICERS  
OF THE  
SUPREME COURT.

CLERK,  
ALEXANDER HESS.

SHERIFF,  
DAVID A. ROACH.

LIBRARIAN,  
JOHN C. McNUTT.

**CASES**  
 ARGUED AND DETERMINED  
 IN THE  
**Supreme Court of Judicature**  
 OF THE  
**STATE OF INDIANA,**  
 AT INDIANAPOLIS, NOVEMBER TERM, 1896, AND MAY TERM,  
 1897, IN THE EIGHTY-FIRST YEAR  
 OF THE STATE.

THE TOWN OF HARDINSBURG ET AL. *v.* CRAVENS.

[No. 18,126. Filed May 20, 1897.]

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**HIGHWAYS.**—*Establishment Of.—Notice to Landowner.—Statute Construed.*—In a proceeding under section 6762, Burns' R. S. 1894 (5085, R. S. 1881), to ascertain, describe, and have entered of record, a public highway which has been used as such for twenty years or more, but not sufficiently described, the owner of real estate to be affected must be notified thereof, or the acts of the board of commissioners will be void. *p. 7.*

**PRACTICE.**—*Commissioners' Court.—Cannot Set Aside or Modify Final Order or Judgment.*—When a proceeding is finally ended before the board of county commissioners, they cannot take it up again, and make further orders or modify those which they have already made. *p. 8.*

**OVERRULED CASES.**—*Construction of Statute.—Last Decision the Law.—Exceptions.*—The last construction placed upon a statute by the Supreme Court will be held to be the law upon the subject, although the previous construction was contrary thereto, as to parties who did not enter into any contract relations on the faith of the

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former construction, or change their position to the detriment of any of them, or part with value on the faith of such construction. pp, 8-10.

**INJUNCTION.**—*Wrongful Appropriation of Land for Street.*—An injunction is the proper remedy where a town is proposing to wrongfully appropriate land for a street, under color of right, without assessment, and tender of compensation to the owner. p. 10.

From the Washington Circuit Court. *Affirmed.*

*Mitchell & Mitchell* and *Alsbaugh & Lawler*, for appellants.

*John A. Zaring* and *M. B. Hottel*, for appellee.

MCCABE, J.—The appellee sued the appellants to enjoin them from taking down certain gates across an alleged highway passing over and through appellee's land. The trial court overruled a demurrer to the complaint, assigning insufficiency of facts stated therein to constitute a cause of action. The defendants refusing to plead further, the plaintiff took judgment upon demurrer. The errors assigned only call in question that ruling and the sufficiency of the facts. The substance of the complaint is that in the year 1871, and a long time previous thereto, James A. Cravens owned a large tract of land which was inclosed and used as a farm in Washington county, and during said time a road passed through a part of said farm, which road had been used by said Cravens and some of his neighbors, with his permission, for a number of years. That said road passed through said Cravens' enclosure by means of gates at each of the fences enclosing said Cravens' farm, and the same had been changed from time to time to suit the convenience of said Cravens. That at the March term of the board of commissioners of said county, for 1871, one Aaron L. Hardin appeared before said board and made affidavit

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that said road passing through said farm had been used by the public for a period of more than twenty years, and asked an order of said board to have said road laid out and established and made of record as one of the public highways of the county. That said road entire, including the portion running through said farm, was in said affidavit described and bounded as follows: "Beginning at the northeast corner of section 23 in Madison township, thence running south on the line between sections 23 and 24, and between the lands of William W. Cravens, David Patton, and Charles Ellis' heirs, about 236 rods, thence in a southwesterly direction through the lands owned by David Patton and Elijah Newland, until it intersects the section line No. 26, about three-quarters of a mile, thence west on the line of said section 26 about 100 rods, between the lands of Hyatt H. Rutherford and Elijah Newland, thence in a southwesterly direction about one-half mile through the lands owned by Hyatt H. Rutherford to the section line of section 35, thence due west about 120 rods, between lands owned by James A. Cravens and Hyatt H. Rutherford, thence in a southwesterly direction one mile to the lands owned by James A. Cravens in section 34, where said road now runs, until it intersects the south line in section 34 in said Madison township." That said Hardin, in his said affidavit, made oath that said road, with the courses and directions above described, had been used and traveled by the public for more than twenty-five years without objection or interruption, and that no record of said highway had been made, and asked that the same be recorded, and that a duly certified copy of the proceedings of said court be transmitted to the proper trustee, according to law. That no notice of any kind was given by said Hardin, or by the auditor of said county, or any one else, to

said Cravens, and he had no notice or knowledge of said proceeding until after the March term of said board. That no one appeared to said petition and proceeding to object to or resist the same. And said board at said March term granted said order as prayed for in said petition and affidavit, and ordered that said road be established and entered of record as described in said petition, and that the proper trustee be notified. That in truth and in fact, that part of said road which runs through the lands of said James A. Cravens had been, during said twenty-five years previous to the filing of said affidavit and petition by said Hardin, frequently changed, and had no certain defined and established roadbed or defined width, and had, in fact, never been used by the public or any one, except with gates; and said part of said road at all times had been enclosed by said Cravens, and had been by him permitted to be used with gates, and not otherwise. Said James A. Cravens, shortly after the making of said order by said board of commissioners, learned of the same, and at the next regular meeting, June term for 1871, of said board of commissioners, the said James A. Cravens appeared and filed his application in writing, setting forth the fact that said road had not been used for twenty years without objection or interruption, and asking that said order be set aside, and that he be allowed to defend, and such request was granted, and such proceedings were thereupon had before said board that said former order was in part vacated, set aside, and so changed and modified that such part thereof as affects the said farm of said James A. Cravens was made to read thus: "Thence in a southwesterly direction through the lands of James A. Cravens about sixty rods to the mouth of the lane, be entered of record, and as to that portion of said road commencing at the mouth of

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the lane north of the house of said Cravens, thence running in a southwesterly direction through the lane of James A. Cravens to the base line, the said Cravens reserves the right to change, erect, and maintain gates across said road, but agrees to keep said road in good repair; the citizens are to have the right to work said road as if it was a public road, and the right to enter upon adjoining lands of James A. Cravens, and take timber and stones to keep up said road, and the court orders the order heretofore made to be so amended." That said former order was so set aside and amended with the consent of said Hardin. That said first order was in fact never acted upon or enforced, and said road was never in fact established and opened under said order. That the gates across said road where it runs through said Cravens' farm were in fact never taken down under said order, but remained and continued to be, ever since said first order, used and traveled, with said gates across the same. That ever since making said first order, said part of said road passing through said Cravens' farm has been used, so far as the gates are concerned, just as it had been before the making of said orders, and has been several times changed from place to place on said farm and has never been used without gates; and it has been so changed that there now remains only about 225 yards of the same where said first order laid it out and established it, and only one gate remains across said part of said road, and this is at a point where one of said changes begins, to-wit: On the line between the lands of Virginia Davis and appellee. The remainder of said road passing through said farm has been completely changed and abandoned. That in the year of 1893 said James A. Cravens departed this life, but prior to his death he conveyed a part of said farm to his son, the plaintiff herein, and a part to his daughter, Vir-

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ginia E. Davis. That on and near the line between the lands so deeded to said plaintiff and Virginia E. Davis, at the point where said road crosses the same, said deceased had kept and maintained a gate across said road, and this plaintiff continued and still continues to keep and maintain said gate, the same being on the part of said farm conveyed to plaintiff. And said deceased kept and maintained other gates across said part of said road; and this plaintiff still continues to maintain and keep another gate across said road in its course on through his part of said farm, but at a point where said road has been completely changed from where it was established by said first order. That after the conveyance by said James A. Cravens to his said daughter, and after his death, said daughter changed that part of the road passing over her part of said farm, and took down all gates on her part, and threw the same open to the free use of the public. That since 1871 the town of Hardinsburg, an incorporated town of said county, extended and enlarged its corporate limits, and undertook to take in and include within its corporate limits the part of said farm over which said road passes, and across which gates are kept and maintained by plaintiff, and it is now claimed by said town that the part of said road passing through plaintiff's part of said farm, across which road gates are kept and maintained as aforesaid, is within the corporate limits of said town, and was so at the time of making the order herein-after mentioned. No part of said road inclosed within said gates has ever been worked by the public or by the officers of said county or town either before or since the making of said orders by the board of commissioners. That on the — day of February, 1896, Amos Davis and others filed with, and before the town board of trustees of said town of Hardinsburg a peti-



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tion and application to said board for an order to remove and tear down said gates across said part of said road passing through plaintiff's said farm, and such proceedings were had upon said application by said town board, that an order was by said board passed, made, and entered of record, ordering the marshal of said town to serve notice on plaintiff to remove said gates within ten days, which was served on plaintiff on May 26, 1896. That said board of trustees of said town threaten, and are about to and will, unless restrained and enjoined, tear down and remove said gates across said road, and thereby expose plaintiff's farm and the crops thereon to the danger and damage of stock of all kinds without, and to the loss of plaintiff's stock within, and otherwise hinder and prevent plaintiff in the free use and enjoyment of his said land, and plaintiff's injury and damage occasioned thereby will be such as cannot be adequately compensated in damages. Prayer for a temporary restraining order until the final hearing, and then that the defendants be perpetually enjoined from doing the alleged threatened acts. The demurrer admits that the first order of the board of commissioners was made and entered without notice to the owner of the real estate to be affected. It is now well settled that in a proceeding under section 6762, Burns' R. S. 1894 (5035, R. S. 1881), empowering the board of commissioners to cause "to be ascertained, described, and entered of record" public highways which have been used as such for twenty years or more, and those which have been laid out but not sufficiently described, and such as have been used for twenty years, but not recorded, the owner of real estate to be affected must be notified thereof or the acts of the board of commissioners in that behalf will be void. *Vandever v. Garshwiler*, 63 Ind. 185; *Yelton v. Ad-*

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*dison*, 101 Ind. 58; *Washington Ice Co. v. Lay*, 103 Ind. 48; *Orton v. Tilden*, 110 Ind. 131.

It is conceded that the order of the town board of the town of Hardinsburg, appellant, must depend and rest for its validity upon the action of the board of commissioners of the county, as it is not claimed the road or highway in question has been opened as a street since the annexation of the territory. Such is the law. *Tucker v. Conrad*, 103 Ind. 349, 355; *Insurance Co. v. Patterson*, 103 Ind. 582.

The statute above cited has been in force ever since the same was first enacted March 5, 1867. The counsel on both sides are substantially agreed that the second order of the board of commissioners was void. That is also correct as a legal proposition. The right and power to set aside or modify a final order or judgment by a court of limited and special jurisdiction, such as the board of county commissioners is, does not exist. When a proceeding is finally ended before the board of commissioners, they cannot take it up again and make further orders or modify those they have already made. *Doctor v. Hartman*, 74 Ind. 221; *Kyle v. Board, etc.*, 94 Ind. 115, 118; *Board, etc., v. State, ex rel*, 61 Ind. 75; *Board, etc., v. Logansport, etc., Gravel Road Co.*, 88 Ind. 199.

But it is contended a different rule of construction of the statute cited prevailed in this court from the time *Weston v. Lumley*, 33 Ind. 486, was decided until after the first order in controversy here had been made and entered, and that the subsequent change of decision of this court as to the necessity of notice in such cases can not have the effect to invalidate said order. *State v. Schultz*, 57 Ind. 19; *Gibbons v. Copper*, 67 Ind. 81, and *Higham v. Warner*, 69 Ind. 549, are all cited as establishing the contrary rule, that no notice is necessary in such cases. It can

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hardly be said that these cases directly decide that no notice in such cases is necessary to the validity of such an order, though it may be they indirectly so hold. But if they did directly so hold, and that that construction of the statute in question by this court prevailed at the time the first order of the board of commissioners here involved was made, yet that would not be enough to uphold the validity of the order without notice. Counsel for appellants cite in support of this contention, *Haskett v. Maxey*, 134 Ind. 182, and *Stephenson v. Boody*, 139 Ind. 60. In the former case it was said: "Courts of last resort are often constrained to change their rulings on questions of the highest importance. When this is done, the general rule is that the law is not changed, but that the court was mistaken in its former decision, and that the law is, and always has been, as expounded in the last decision. But to this general rule there is a well established and well understood exception. This exception is that, 'After a statute has been settled by judicial construction, the construction becomes, so far as contract rights acquired under it are concerned, as much a part of the statute as the text itself, and a change of decision is to all intents and purposes the same in its effect on contracts as an amendment of the law by means of a legislative enactment.'" Citing in support thereof, *Douglass v. County of Pike*, 101 U. S. 677; *Anderson v. Santa Anna*, 116 U. S. 361; *Insurance Co. v. Debolt*, 16 How. 415; *Gelpcke v. City of Dubuque*, 1 Wall. 175; *Havemeyer v. Iowa Co.*, 3 Wall. 294; *Olcott v. Supervisor*, 16 Wall. 578; *Taylor v. City of Ypsilanti*, 105 U. S. 72.

To the same effect is the other case cited by appellants from the decision of this court, namely, *Stephenson v. Boody*, *supra*. The facts set forth in the complaint do not show any contract relations entered into

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Palmer v. Dosch et al.

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by the parties on the faith of the alleged construction of the statute requiring no notice in order to make such order valid. Nor does it appear that any one changed his position to his detriment, or parted with value on the faith of such construction. Hence, the general rule must apply that the law is not changed by the alleged change of decision, but that the court was mistaken in its former decision and that the law is, and always has been, as expounded in the last decision. Injunction is the proper remedy in this case, as the town is proposing to appropriate appellee's land for a street wrongfully under color of right, without assessment and tender of compensation to the owner. *City of New Albany v. White*, 100 Ind. 206; *Sidener v. Norristown, etc., Turnp. Co.*, 23 Ind. 623.

Therefore, the circuit court did not err in overruling the demurrer to the complaint.

Jndgment affirmed.

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PALMER v. DOSCH ET AL.

[No. 18,148. Filed May 20, 1897.]

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**BOUNDARIES.—Adverse Possession.**—A boundary fence between tracts of land which has existed for more than forty years, and which has been recognized by the adjoining owners and their immediate and remote grantors as the line dividing such tracts of land, is the true line, although the deeds of the respective owners conveyed the land according to the survey which showed such fence not to be the original line according to the survey.

From the Greene Circuit Court. *Reversed.*

*Arnold J. Padgett* and *J. Alvin Padgett*, for appellant.

*Milton S. Hastings*, *Josiah G. Allen* and *E. E. Hastings*, for appellees.

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HOWARD, J.—On September 16, 1865, appellant purchased several parcels of land in the county of Daviess, among them the following, which he has since continued to own: "Location number two hundred and seventy-nine (279), in township number three (3) north, range number seven (7) west, containing fifty (50) acres." On October 14, 1892, the appellees purchased certain adjoining lands in the same county, township and range, among them the following, which they have since continued to own: "The west half of the northeast fractional quarter of section seventeen (17), in township three (3) north, in range seven (7) west." The northeast quarter of section 17 is called "fractional" for the reason that a part of said quarter section is overlapped by said "location No. 279."

When appellant purchased location No. 279, in September, 1865, there was a fence standing on the west and south boundary lines, between this land and the above described quarter of section 17, township 3 north, now owned by appellees. This fence was so located as far back as 1853, and the boundary as so fixed had remained unchanged up to the beginning of this suit. The land in dispute lies between this fence and the true western boundary of location 279. This disputed land was, in 1853, and has since continued to be, in cultivation, up to said fence, by appellant's remote and immediate grantors, and by himself. At the time of appellant's purchase of location 279, his grantor had wheat stacked in the northwest corner of the land in controversy, near to said fence, and his grantor then pointed out to him the fence as the west boundary of said location 279. Appellant immediately took possession of his purchase, including the piece now in dispute, which he believed to be a part thereof, and thereupon, the land being low and wet, cut a ditch along by the fence. The possession so

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*Palmer v. Dosch et al.*

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taken was continued without interruption from the time of the purchase, in September, 1865, until the institution of this action, October 8, 1895.

Appellees contend that since it appears that appellant and his grantors intended to claim only to the western boundary of location 279 there was no adverse possession of the land here in controversy, namely, that lying west of what is now shown to be the original western boundary. It is not denied, however, that from 1853 to the present time, appellant and his immediate and remote grantors continuously claimed ownership of the tract now in controversy, cultivating the ground and raising crops up to the fence which all along they believed to be the true boundary. It further appears that appellees' grantors also treated the west and south fence as the boundary between their land and that of appellant. Even the appellee, John Dosch, testified that he went with his immediate grantor to examine the boundaries of the land before his purchase, in 1892, and this fence was pointed out to him as the boundary between the lands he was about to buy and those of appellant. It thus appears that at the end of nearly forty years after the fence is known to have been built, the owners on each side were found acknowledging it as their mutual boundary. Whatever may be the rule as to unascertained lines, or as to constructive possession in relation to a supposed boundary which turns out not to be the real one, *Silver Creek, etc., Corp. v. Union Lime and Cement Co.*, 138 Ind. 297, we think that we have here a case where both parties for much longer than the twenty-year period, recognized a fixed line as the common boundary of their adjoining possessions, and that the boundary so recognized should now be held to be the true one.

The intentions of parties may often be better determined from their acts than from their words. Both appellant and appellees purchased their respective lands with the understanding that the fence in question marked the true boundary. Each thus acted in the most important matter that could concern his relations to his land—its purchase; and in this they but carried out the unchanged conduct of their immediate and remote grantors who had used and cultivated the lands up to the fence as a boundary for more than an ordinary lifetime.

"The law is," said this court in *Dyer v. Eldridge*, 136 Ind. 654, "that the location of a division boundary fence, acquiesced in and acted upon, and the premises improved up to the line by each, for twenty years, becomes binding as the true line. *Richwine v. Presbyterian Church, etc.*, 135 Ind. 80; *Wingler v. Simpson*, 93 Ind. 203, and cases there cited."

In *Wingler v. Simpson*, *supra*, it was held, citing numerous authorities in this and other states, that, on appeal from a survey to establish a boundary line between adjoining landowners, evidence of occupancy, under claim of title, for more than twenty years, to a line different from that fixed by the survey is admissible.

In *Brown v. Anderson*, 90 Ind. 93, the rule was laid down, even more emphatically, that continuous occupancy and use of land as owner for twenty years, to a fence really not upon the true boundary line, takes away the title of the real owner, and transfers it to such occupant, so that he may maintain ejectment.

There can be no question that the record in this case shows that appellant himself, to say nothing of his grantors, immediate and remote, occupied and used the land in question as owner for over thirty years.

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It is true that appellant had not color of title to the disputed strip. His deed covered only location 279. He could, therefore, have no constructive possession of lands outside that location. But he had actual possession. His fence enclosed the land for over forty years, and he and his grantors cultivated the ground up to the fence continuously, and raised crops upon it for the whole time. It thus became his land by sufferance of the adjoining proprietors, by efflux of time, and by consequent operation of law.

There was here something more than claiming to the fence if that should be found to be the true boundary. The acts of the appellant showed a claim to the fence as the true boundary. The claim may have been a mistaken one, but it was not doubtful or uncertain; the title passed successively from grantor to grantee with an uninterrupted claim of the fence as the western boundary. That it was not, in fact, the original line, as run by the surveyors, can make no difference in such a case. The actions of the adjacent owners substituted it as the true line.

The finding of the court, as we think, was contrary to the evidence.

Judgment reversed, with instructions to grant a new trial.

SHEA *v.* THE CITY OF MUNCIE.

[No. 18,008. Filed Feb. 23, 1897. Rehearing denied May 20, 1897.]

APPEAL AND ERROR.—*Bill of Exceptions.*—*Evidence.*—Where the longhand manuscript, purporting to contain all the evidence, is followed by the shorthand reporter's certificate, the instructions, and the judge's certificate, it sufficiently appears that the bill of exceptions contains all of the evidence. *p. 19.*

INTOXICATING LIQUORS.—*Ordinance Restricting Sale to Business Portion of City.*—An ordinance prohibiting the sale of intoxicating liquor in the residence portion of a city, and confining the sale

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thereof to the "business portion" of such city, under clause 13 of section 3608, Thornton's R. S. 1897, is not void for indefiniteness because the boundaries of the residence and business portions are not set forth therein. p. 20.

**STATUTORY CONSTRUCTION.**—*Acts Passed at the Same Session of Legislature.*—Where two statutes are enacted at the same session of the legislature they should be construed together, if possible; but, if they be irreconcilable, the later supersedes the earlier. p. 21.

**INTOXICATING LIQUORS.**—"Moore Law," *Not Local and Special Legislation.*—The act of March 9, 1895, known as the "Moore Law," amending clause 13 of section 3106, R. S. 1881, authorizing cities to pass ordinances prohibiting the sale of intoxicating liquors in the residence portion thereof, and confining the sale to the business portion, is not unconstitutional as being local and special legislation within the meaning of section 22, article 4, of the constitution. pp. 21-25.

**SAME.**—*Acts of March 9 and March 11, 1895, Not Repugnant.*—No such irreconcilable repugnance exists between the act of March 9, 1895, amending section 3106, R. S. 1881, authorizing cities to license, regulate and restrain the places where intoxicating liquors are kept for sale, and the act of March 11, 1895, which is a general act to better regulate and restrict the sale of intoxicating liquors, as to make the latter operate as an implied repeal of the former. pp. 21, 22.

**MUNICIPAL CORPORATION.**—*Validity of Ordinance.*—The question whether an ordinance is reasonable cannot be raised to affect its validity, where the power to enact the particular ordinance is specifically conferred upon the municipal corporation. pp. 22, 23.

**INTOXICATING LIQUORS.**—"Moore Law."—*Title of the Act Sufficiently Comprehensive.*—The fact that the title of the act of March 9, 1895, fails to mention the subject of prohibiting sales in the residence portion of cities does not render the act unconstitutional under section 19, article 4, of the constitution, as it is not prohibition, but regulation of the traffic that the act provides for. p. 26.

**SAME.**—*County License.*—*Evidence.*—A license to sell intoxicating liquors issued by the board of county commissioners does not exempt the licensee from compliance with any lawful regulation by a city touching such sales conducted within the corporate limits thereof; and in a prosecution for a violation of an ordinance prohibiting the traffic in the residence portion of the city, the county license is not admissible as evidence. pp. 26, 27.

**SAME.**—*Violation of Ordinance Restricting Sale to Residence Portion of City.*—*Former License as Defense.*—An ordinance prohibiting the sale of intoxicating liquors in the residence portion of a city, and providing that licenses previously issued shall be no defense to an action founded on the ordinance, is valid, and such license is

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not admissible as evidence in defense in a prosecution for a violation of the ordinance. pp. 27-31.

**SAME.—Violation of Ordinance Restricting Sale.—Retention of Former License Fees.—Estoppel.**—Where an ordinance prohibits the sale of intoxicating liquors in the residence portion of a city, and provides that licenses previously issued shall be no defense in an action founded on the ordinance, the payment of the license fee to, and the retention thereof by the city do not estop the city from the enforcement of the ordinance. p. 32.

**MUNICIPAL CORPORATION.—Ordinance, Failure to Record and Sign.—Statute Construed.**—Section 3534, Burns' R. S. 1894, providing that ordinances shall, within a reasonable time after their passage, be recorded, and shall be signed by the presiding officer of the city, and attested by the clerk, is directory merely, and a failure to record and sign the ordinance for some months after its passage does not affect its validity. pp. 32, 33.

**SAME.—Ordinance.—Action for Violation of, a Civil Suit.—Evidence.**—In a civil suit by a city for the violation of an ordinance, it is not essential to recovery by the city to prove a sale to both persons named in the complaint, proof of sale to one is sufficient. p. 33.

**INTOXICATING LIQUORS.—Construction of Act of March 9, 1895.—"Residence Portion of City."**—The "residence portion of a city," within the meaning of clause 13 of section 3608, Thornton's R. S. 1897, does not necessarily mean a portion of the city given up exclusively to family residences. pp. 34, 35.

**INSTRUCTIONS.—Naming of Circumstances to Be Considered.**—An instruction that the jury may consider certain enumerated circumstances which were proper for their consideration, but which does not tell them that they were bound to consider them, does not invade the province of the jury. p. 36.

**APPEAL.—Assignment of Error.**—An objection to the introduction of evidence, not made a ground for a new trial, will not be considered on appeal. p. 36.

**EVIDENCE.—Whether or Not a Building Is Within the Corporate Limits of a City, a Question of Fact.**—A question propounded to a witness as to whether or not a saloon building is within the corporate limits of a city is not objectionable as calling for a conclusion. p. 37.

**APPEAL AND ERROR.—Weight of Evidence.**—The Supreme Court will not weigh conflicting evidence to determine where the preponderance lies. p. 38.

From the Delaware Circuit Court. *Affirmed.*

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*Gregory, Silverburg & Lotz, W. L. Ball and J. G. Leffler, for appellant.*

*Warner & Brady, for appellee.*

MCCABE, J.—The appellee sued the appellant before the mayor of the city of Muncie to recover the penalty provided for the violation of a certain ordinance of said city with which appellant was charged in the complaint.

The plaintiff recovered judgment before the mayor, and the defendant appealed to the circuit court, where another trial resulted in a verdict and judgment of one dollar against the defendant over his motion for a new trial. The circuit court also overruled a demurrer for want of sufficient facts to the complaint, and overruled a motion in arrest of judgment by the appellant.

The errors assigned call in question the above-named rulings.

The ordinance, with a violation of which the complaint charges the appellant, reads as follows:

“Sec. 1. Be it ordained by the common council of the city of Muncie that it shall be unlawful for any person or persons to sell any intoxicating liquors to be used in and upon the premises in the residence portions of the said city of Muncie, but all such sales shall be excluded from such portions of such city, and all places where such sales may be made shall be confined to the business portion thereof.

“Sec. 2. This ordinance shall apply to all sales within the said residence portions of said city whether the seller or sellers, or either of them, has taken out a license from said city or from Delaware county or the State of Indiana, and said license shall constitute no defense to any action founded on this ordinance.

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"Sec. 3. Any person or persons violating any provision or provisions of this ordinance shall, on conviction, be fined in any sum not exceeding one hundred dollars.

"Sec. 4. This ordinance shall be in force and effect from and after its passage and publication for two weeks in the Muncie Daily Times.

"Passed August 26, 1895.

GEORGE W. CROMER, Mayor.

"Attest: F. A. ELROD, Clerk."

The complaint, in substance, charged the appellant with having, on the 24th day of January, 1896, at said city and Delaware county, Indiana, unlawfully violated said ordinance, giving the number of the sections charged to have been violated, with the date of its adoption, by then and there selling to John Max and David Spangler, at and for the price of ten cents, in and upon certain premises particularly described, within the residence portion of said city, and not within the business portion thereof, certain intoxicating liquor, to-wit, beer to be used and drunk in and upon said premises. But the complaint did not set out a copy of the ordinance as it only need recite the number of section or sections charged to have been violated, with the date of its adoption. Section 3501, Burns' R. S. 1894 (3066, R. S. 1881); *City of Huntington v. Pease*, 56 Ind. 305.

It is contended by the appellee that, inasmuch as the ordinance does not appear in the complaint, that its validity cannot be presented by the demurrer to the complaint. There is no other objection to the complaint pointed out in the appellant's brief. But as the validity of such ordinance is conceded by the appellee to be necessarily involved by the evidence on the motion for a new trial, we will proceed to determine its validity without deciding whether the ques-

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tion of its validity was raised by the demurrer or not. Indeed, that question, once settled, is decisive of about every question presented on this appeal.

But, preliminary to that question, we are confronted by another question raised by the appellee's counsel. They contend that the evidence is not in the record, because there is no certificate by the trial judge that the bill of exceptions contains all the evidence. The longhand manuscript purported to contain the evidence, and immediately following such evidence is the statement that "this was all the evidence given in the cause," and then follows the shorthand reporter's certificate, and then follows what purports to be instructions, and then the judge's certificate and signature. The case of *Rosenbower v. Schuetz*, 141 Ind. 44, cited by appellee's counsel in support of their contention, was a case where the only statement that the bill contained all the evidence was in the reporter's certificate. But the case of *McCormick v. Gray*, 114 Ind. 340, was just such a case as this, as to the point now in question, and adhering to that case, we hold that it sufficiently appears that the bill contained all the evidence. The objection to the oath administered to the stenographer, as to whether it was to him, as official reporter, or to truly report that case, is without substantial merit.

It is conceded by appellant's learned counsel that if the legislature could delegate authority and power to the city to pass or enact such an ordinance, that it has done so by an act approved March 9, 1895, to amend section 3106, R. S. 1881, providing for the incorporation of cities and prescribing their powers in the following language: "*Thirteenth.* To license, regulate, and restrain all shops, inns, taverns, or other places where intoxicating liquors are kept for sale, to be used in and upon the premises, and in regulating, restrain-

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ing, and licensing such inns, taverns, shops, or places aforesaid, they shall have the power to designate the room, building or structure where such liquors may be sold, and may exclude such sales from the suburban or residence portion of such city, and confine the places where such sales may be made, to the business portion of such city, and may direct the arrangement and construction of the doors, windows, and openings of the particular room in such building where such sales may be had, or such intoxicating liquors be drunk." Acts of 1895, p. 182.

The first objection to the ordinance is, that it is too uncertain and indefinite as to the boundaries of the localities designated "business portion" and "residence portion" of said city. It will be observed that the ordinance is as definite and certain as the statute.

It is not insisted that the statute is void or inoperative for uncertainty or indefiniteness, and we do not think it is. But it is strenuously insisted that the ordinance is void for such uncertainty. It is insisted that the ordinance, or some ordinance, should have first defined and prescribed the boundaries of the residence portion of said city. We do not decide that that might not have been properly done. The only difference between that course and the course pursued is, that the question of fact involved as to the true boundaries of such residence portion of said city was left to be determined in a court of justice, where the parties interested pro and con could be heard by testimony instead of the legislative department of the city hearing the evidence where no parties could have been heard to controvert the facts before the common council.

"An ordinance is not void for want of clearness of expression or on account of a difficulty in construing or applying its provisions." *Horr & Bemis Munic.*

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Ordinances, section 193. To the same effect is *Nealis v. Hayward*, 48 Ind. 19.

"An ordinance is sufficient which follows the words of an express power; for instance, under a power to license the sale of 'small ware,' an ordinance forbidding the sale of 'small ware' on the streets, and not defining what constitutes 'small ware' is definite enough." *Horr & Bemis Munic. Ordinances*, section 78.

The next objection to the statute in question is, that it was repealed by implication in the act known as the "Nicholson Law," approved March 11, 1895, being an act to better regulate and restrict the sale of intoxicating liquors. The repeal of statutes by implication is not favored by the law, and where two statutes are enacted, as in this case, at the same session of the legislature, they should be construed together, if possible, but if they be irreconcilable, the later supersedes the earlier. *Wright v. Board, etc.*, 82 Ind. 335. And where two statutes may well stand together it is the duty of the courts to construe them *in pari materia*. *City of Madison v. Smith*, 83 Ind. 502; *Jeffersonville, etc., R. R. Co. v. Dunlap*, 112 Ind. 93; *Robinson v. Rippey*, 111 Ind. 112. Repeal by implication occurs only where there is an irreconcilable repugnancy between two statutes. *Carver v. Smith*, 90 Ind. 222.

No irreconcilable repugnance between the two statutes has been pointed out to us, nor have we been able to discover any.

It is next urged that the legislature, in the passage of the so-called "Nicholson Law," approved March 11, 1895, have recognized the fact that the subject-matter embraced in that act could be embraced in a general law, and be made applicable to all the people and all the territory of the State of Indiana.

And counsel contend that though the subject of

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both acts does not fall under section 22, article 4, of the state constitution, absolutely prohibiting local or special legislation on the subjects therein specified, yet that the act of the legislature in enacting the last of said two acts proves that the subject of both acts, being, as is claimed, one and the same, is one where a general law can be made applicable, and hence the later of the two acts, being local, violates section 23 of said article. This is what might be called a far-fetched argument.

We do not agree with the assumption of counsel that the two acts are upon one and the same subject, even if that would enable us to say that the subject of the last was one upon which a general law could be made applicable, and hence a violation of said section 23.

It is insisted that the act is local because it authorizes the passage of an ordinance prohibiting the sale of intoxicating liquors in the residence portion of the city of Muncie, while the business portions of said city may enjoy the blessings of the traffic as to them may seem good.

If this act be unconstitutional for the reason urged, all our legislation for the incorporation of cities and towns since the adoption of the present constitution has been unconstitutional and void, for it contemplated and authorized the adoption and enforcement of ordinances and by-laws within each municipal corporation of both town and city, which were not operative outside of the particular corporation where adopted; and not even operative alike in all portions of the municipality. Such legislation has been upheld and recognized as constitutional ever since the adoption of the present constitution.

Another objection to the ordinance is, that it is unreasonable. But where, as here, the power to enact



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the particular ordinance is specifically conferred on the municipality, the question whether it is reasonable can no more be raised so as to affect its validity than could the same objection be raised against the statute so as to affect its validity, and that is not a valid objection to a statute. *Cleveland, etc., R. W. Co. v. Harrington*, 131 Ind. 426; *Champer v. City of Greencastle*, 138 Ind. 339, and authorities there cited; *Rund v. Town of Fowler*, 142 Ind. 214; *Beiling v. City of Evansville*, 144 Ind. 644; *Dillon's Munic. Corp.* (4th ed.), sections 328, 319, note 2; *Skaggs v. City of Martinsville*, 140 Ind. 476; 17 Am. and Eng. Ency of Law 247; *Pittsburgh, etc., R. W. Co. v. Town of Crown Point*, 146 Ind. 421; *City of Shelbyville v. Cleveland, etc., R. W. Co.*, 146 Ind. 66.

A large part of appellant's assault upon the statute and the ordinance, scattered all through their eighty-four-page printed brief, is the contention that both the statute and the ordinance amount to local prohibition of the sale of intoxicating liquors, or rather the prohibition thereof in certain localities of the State.

Now the sale of intoxicating liquors by the drink is recognized by our laws as a lawful business. *Champer City of Greencastle, supra*, and authorities there cited. And no one denies that the legislature possesses the power to regulate such business, and to delegate power to municipal corporations to regulate such business. The power to regulate a business, trade, etc., authorizes the municipality to confine the exercise of such business to certain localities, to certain hours of the day, etc. 20 Am. and Eng. Ency, of Law, 723. "It is held that the power of regulating slaughter-houses implies power to fix their location, to direct the manner of their use, and to prohibit their continuance whenever necessary to the welfare of the community. The only thing that the power recognizes as

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unavoidable is their right to exist, but the corporation may say how, when, and where. Under a power to regulate certain trades or occupations their exercise may be restricted to certain places, and restrictions may be laid on the manner of conducting them." Horr & Bemis Munic. Ordinances, section 30.

This principle was applied and upheld in the case of *In re Wilson*, 32 Minn. 145, 19 N. W. 723, very much like the present case, in the use of the following language: "We have no doubt whatever of the power of the city council to determine where, and within what portions of the city, the business of selling and dealing in intoxicating liquors may be carried on. This right is implied and included in the power to *regulate*. And if they deem that the good order of the city requires that this traffic shall be excluded from the suburban and residence portions of the city, and confined to the more central and business portions, where it can be kept under more effectual police surveillance, their power to do so is, in our judgment, undoubted. Under a grant of police power to *regulate*, the right of the municipal authorities to determine where and within what limits a certain kind of business may be conducted, has often been sustained. For example, the place where markets might be held; where butchers' stalls or meat shops may be kept; where hay or other produce shall be weighed; where auctions may be held; the limits within which certain kinds of animals shall not be kept; within which the business of tallow chandler shall not be carried on; within which gunpowder shall not be stored; within which slaughter-houses shall not be kept; the distance from a church within which liquor shall not be sold. Such cases might be multiplied almost indefinitely. If, under the general police power to regulate, this can be done as to such kinds of business, on

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what principle can it be claimed that similar regulations may not be adopted as to the sale of intoxicating liquors,—a traffic which all civilized communities deem necessary to place under special police regulations and restraints.” To the same effect are *Portland v. Schmidt*, 13 Oregon 17, 6 Pac. 221; *Black on Intoxicating Liquors*, sections 227-234; 11 Am. and Eng. Ency. of Law, 606; *State v. Shroeder*, 51 Iowa 197, 1 N. W. 431; *DeBois v. State*, 34 Ark. 381; *State v. Rauscher*, 1 Lea (Tenn.) 96; *Commonwealth v. Jones*, 142 Mass. 573; *Mayor v. Shattuck*, 19 Col. 104, 34 Pac. 947; *People v. Cregier*, 138 Ill. 401, 28 N. E. 812.

This power is of the same nature of the power of a municipality to prevent the erection of wooden buildings within certain limits in a city. Such power has been upheld by this and other courts without question (*Clark v. City of South Bend*, 85 Ind. 276; *Baumgartner v. Hasty*, 100 Ind. 575; *Kaufman v. Stein*, 138 Ind. 49), and is similar to that to exclude slaughter-houses, tallow chandlers and other employments that are offensive to the sense of sight, hearing or smell from certain portions of the city.

While the legislative and judicial departments of the state government of Indiana have steadily recognized the business of selling intoxicating liquors by the drink as a lawful business for a half century, yet during the same period such departments have recognized that it was a dangerous business, dangerous to the peace and good order of society, requiring strict regulation and restraint.

But this court is wholly unable to see anything more sacred about the business, though it be a lawful one, than any other lawful business fraught with danger to the peace, safety, good order, health, comfort, or morals of the community. And therefore we

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see no reason why that business may not be required to submit to the same kind of restraint and regulation that other lines of business of the character mentioned are constantly required to submit to.

Appellant's counsel next contend that the act violates section 19 of article 4, of the state constitution, requiring the subject of the act to be expressed in the title, in that the title fails to mention the subject of prohibiting sales in the residence portions of cities. It is not prohibition, but regulation of the traffic that the act provides for, and that was what the amended section provides for. *Black on Intoxicating Liquors*, sections 227, 234.

It is practically conceded that the title is amply sufficient to cover the subject of the regulation of the traffic in cities. Nor is there any question made but that that subject is mentioned in the title; and if the act embraces another distinct subject, that of prohibition, and not properly connected with the one subject of regulation, then the act would violate the section in embracing more than one subject, a thing appellant's counsel lay no claim to. Nor is there anything in the contention that the act violates section 23 of article 1, of the constitution, providing that: "The general assembly shall not grant to any citizen, or class of citizens, privileges or immunities which, upon the same terms, shall not equally belong to all citizens."

The next point made is, that the trial court refused to allow appellant to read in evidence his license, issued to him by the board of commissioners.

The statute provides that a city may require and exact a license to retail intoxicating liquors within its corporate limits of one who has already received a license from the board of commissioners of the county so to sell by the drink. Section 7282, Burns' R. S.

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1894 (5317, R. S. 1881); *Bush v. City of Indianapolis*, 120 Ind. 476; *Wiley v. Owens*, 39 Ind. 429; *Sweet v. City of Wabash*, 41 Ind. 7; *Emerich v. City of Indianapolis*, 118 Ind. 279.

This clearly shows the legislative intent in authorizing the licensing of one by the board of commissioners to sell intoxicants by the drink was not to make such license an exemption from compliance with any lawful regulation by the municipality touching such sales conducted within the corporate limits of such municipality. Therefore the county license was no defense, and was properly excluded.

But the appellant offered in evidence a license issued by the clerk of the city, appellee, for which he had paid to said clerk \$250.00, pursuant to another ordinance requiring such payment from persons selling intoxicants by the drink within the corporate limits of said city. This is urged, with much warmth and vigor by appellant's counsel, as palpable error. And, on the other side, it is contended with equal earnestness that it was not. If the whole ordinance is valid, that is the part providing that such licenses shall be no defense to an action founded on the ordinance as well as the other part, then there was no error.

The character of the power here involved falls within the domain of what is known as the police power. That power resides in the State, and by the act we have been considering, the legislature delegated such police power to the city. And, as was said in *Cleveland, etc., R. W. Co. v. Harrington*, 131 Ind., at page 436: "The State could not deprive itself of the right to exercise the police power by granting to appellant the right to regulate the speed of trains. \* \* \* The police power of a state cannot be alienated even by an express grant upon a valuable consideration.

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Cooley Constitutional Limitations, 340; *Thorpe v. Rutland, etc., R. R. Co.*, 27 Vt. 140.

"The ordinance now under consideration is a police regulation, authorized by an act of the legislature, designed to protect the people of the city of Indianapolis against the dangers incident to the rapid movement of engines and trains through thickly populated localities, and is binding upon the appellant as well as other railroad companies which have tracks within the corporate limits of the city."

The city then may exercise the police power thus delegated, precisely as the State might have done before it was delegated to the city.

In *State v. Woodward*, 89 Ind., at page 114, speaking of the right previously granted to the Vincennes University to sell lottery tickets, and borrowing from the language of the Supreme Court of the United States, this court said: "Any one, therefore, who accepts a lottery charter does so with the implied understanding that the people, in their sovereign capacity, and through their properly constituted agencies, may resume it at any time when the public good shall require, whether it be paid for or not. All that one can get by such a charter is a suspension of certain governmental rights in his favor, subject to withdrawal at will. He has in legal effect nothing more than a license to enjoy the privilege on the terms named for the specified time, unless it be sooner abrogated by the sovereign power of the state. It is a permit, good as against existing laws, but subject to future legislative and constitutional control or withdrawal."

Applying this principle to the regulation of the liquor traffic, this court, in *McKinney v. Town of Salem*, 77 Ind., at page 214, said: "The granting of a license is not the execution of a contract, and the counsel for

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appellants are in error in assuming, as they do, that a license issued pursuant to a general law of the state is a contract. The enactment of a law regulating the liquor traffic is an exercise of the police power of the state. The police power is a governmental one, and permits obtained under laws enacted in its exercise are not contracts. In enacting laws for the regulation of the business of retailing liquors, a sovereign power is asserted, and its exercise does not confer upon any officer authority to make a contract which will abridge or limit this great and important attribute of sovereignty. Sovereigns may make contracts which, under our constitution, will preclude them from impairing vested rights by subsequent legislation, but this result never follows the exercise of a purely police power. The right to legislate for the promotion and security of the public safety, morals and welfare, cannot be surrendered or bartered away by the legislature. *Stone v. Mississippi*, 101 U. S. 814; *Beer Co. v. Massachusetts*, 97 U. S. 25; *Patterson v. Kentucky*, 97 U. S. 501; *Boyd v. Alabama*, 94 U. S. 645; *Freleigh v. State*, 8 Mo. 606; *Metropolitan Board, etc., v. Barrie*, 34 N. Y. 657; *Commonwealth v. Brennan*, 103 Mass. 70; *Fell v. State*, 42 Md. 71. A license to retail liquor is nothing more than a mere permit; it is neither a contract nor a grant. The person who receives it takes it with the tacit condition and the full knowledge that the matter is at all times within the control of the sovereign power of the State."

And in this case, that power having been delegated to the city by the legislature of the State, the city can exercise the same power that the State could before it delegated the power. As was said in *Haggart v. Stehlin*, 137 Ind., at page 54: "Notwithstanding his payment of large sums of money for license fees

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both to the county and the city, his license could be revoked without refunding his money."

In *Moore v. City of Indianapolis*, 120 Ind. 483, a case involving the right of the city to practically nullify the license it had granted by passing an ordinance prohibiting the traffic without the payment of a larger license fee than that paid by the appellant in that case, this court, at page, 489, said: "It is next contended that the municipal authorities had no power, under the statute in question, to enact an ordinance increasing the amount of the license fee, and make it applicable to unexpired licenses, thereby practically annulling permits issued by the city. While conceding that a license is not an absolute contract in which the licensee obtains a vested right, during the full period for which it was granted, to sell upon the same terms as when the license was issued, it is contended that it is, nevertheless, in some sense, a contract between the city and the licensee, under which the latter acquires an absolute right to sell liquors during the term, subject to municipal regulation, without being required to pay any enhanced price, simply for the purpose of increasing the city revenue. Moreover, it is contended that a license to retail intoxicating liquors is a thing of value, in the nature of property, and that, even if the legislature had the power to annul existing licenses, or authorize it to be done, good faith required that the money paid for the unearned portion be refunded. \* \* \* It is sufficient to say that principles as firmly settled as anything can be, upon the highest judicial authority, sweep away every vestige of the foundation upon which the argument against the validity of the ordinance rests. When it is conceded, as it is, and must be, that a law regulating, or authorizing municipal corporations to regulate, and impose restrictions upon, the sale of in-



toxicating liquors, is an exercise of the police powers of the State, then it follows inevitably that neither the State nor the municipality can, by any sort of contract, license, or permit, abdicate, embarrass or bargain away its right to exercise this power in such a manner as it may thereafter deem the public welfare requires. It is the peculiar province of the State, either by legislative enactment or through authority delegated to municipalities, to exert its police power for the protection of the lives, health, and property of its citizens, as well as to maintain good order and preserve public morals. It is everywhere conceded that the traffic in intoxicating liquors affects all these subjects, and that it is, hence, a proper subject for police regulation.

"It is essential, therefore, that the power to regulate should be a continuing one, ever present and available, to be exercised by the state as emergencies may require. Hence, the rule that neither the state, nor any of its agencies to whom the power has been delegated, can divest itself of the right to impose such other or additional restrictions upon the sale of intoxicating liquors, as the maintenance of good order or the preservation of the public morals may seem to require. Cooley Const. Lim. (5th ed.), p. 343." To the same effect is *State v. Bonnell*, 119 Ind. 498.

Therefore, the trial court did not err in refusing to permit the license issued by the city clerk to appellant to be read in evidence, and did not err in refusing to admit the testimony of Elrod, the city clerk of appellant, that he demanded and received from appellant \$250.00 for the permit or license so issued to appellant for the privilege of selling intoxicants in said city for one year. And for the same reason the trial court did not err in refusing to allow appellant to read in evidence the ordinance by which the said clerk was au-

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thorized to demand and receive said sum of \$250.00 for said permit to sell, etc.

And the same principles justify the court's refusal to admit appellant's offered evidence that neither the \$100.00 fee for the county license nor the \$250.00 for the city license had been paid or tendered back to appellant.

Nor the does the payment of the license fee to and retention thereof by the city create an estoppel against the city to enforce the ordinance against selling in the residence portion of the city, as is contended by appellant's counsel, both because of the principles of law above announced, and because the appellant must be held to know the law, and to have known when he sought the permit, and when he paid his money, that the city could lawfully withdraw the permit at any time, and that the city could not barter away its power to do so.

Therefore, there is no element of estoppel about it. The facts and circumstances as to the legal effect of the transaction were equally known to both parties. In such a case there can be no estoppel. *Fletcher v. Holmes*, 25 Ind. 458; *McGirr v. Sell*, 60 Ind. 249; *Long v. Anderson*, 62 Ind. 537; *Lash v. Rendell*, 72 Ind. 475; *Hosford v. Johnson*, 74 Ind. 479; *First Nat'l Bank v. Williams*, 126 Ind. 423; *Watts v. Julian*, 122 Ind. 124; *Roberts v. Abbott*, 127 Ind. 83; *Wolfe v. Town of Sullivan*, 133 Ind. 331; *Wolf v. Zimmerman*, 127 Ind. 486; *Platter v. Board, etc.*, 103 Ind. 360; *State v. Gerhardt*, 145 Ind. 439.

The next point made by appellant is, that the ordinance in question is void because the evidence shows that it was not recorded and not signed by the mayor and attested by the clerk within a reasonable time after its passage. The statute on the subject provides that: "All by-laws and ordinances shall, within a

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reasonable time after their passage, be recorded in a book kept for that purpose, and shall be signed by the presiding officer of the city, and attested by the clerk." Section 3534, Burns' R. S. 1894. The evidence shows that the ordinance was not recorded, signed or attested by the clerk until some months after its passage, or about a month or so prior to April 20, 1896, the day of trial. We need not decide whether the ordinance was signed by the mayor, attested by the clerk, and recorded within a reasonable time or not, as it has been settled by this court that the provision quoted is directory merely, and that a failure to sign the ordinance does not invalidate it. *Martindale v. Palmer*, 52 Ind. 411-414; 17 Am. and Eng. Ency. of Law, 240-243, and authorities there cited; *Horr & Bemis Munic. Ord.*, section 49; *Tiedeman Munic. Ord.*, section 148. There was no controversy but that the ordinance was validly passed, and afterwards, and before the trial, recorded, signed and attested. The delay in recording, signing, and attesting did not affect the validity of the ordinance.

The next complaint is of the instructions given and refused by the trial court. The complaint charged that the sale of the intoxicating liquors complained of was made to David Spangler and John W. Max. The evidence showed that only one of them took beer, and the other took a cigar. The court instructed the jury that if one of them bought beer and drank it, that was sufficient, the other facts alleged being proven, to warrant a finding against the appellant, and refused to instruct, as requested by appellant, to the effect that the evidence must, in order to warrant a finding against the appellant, show a sale to both.

A prosecution for the violation of a city ordinance is a civil suit. *Common Council v. Fairchild*, 1 Ind. 315;

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*Board, etc., v. Chissom*, 7 Ind. 688; *City of Greensburg v. Corwin*, 58 Ind. 518.

And in a civil suit it is only necessary to prove the substance of the issue in order to recover, that is, it is only necessary to prove so much of the complaint, or so many of the facts alleged therein as constitute a cause of action. It is not necessary to prove them all. *Long v. Doxey*, 50 Ind. 385; *Terre Haute, etc., R. R. Co. v. McCorkle*, 140 Ind. 613. The trial court, therefore, did not err in the giving and refusal of the instructions mentioned.

Appellant complains of an instruction refused which in effect told the jury that if appellant's saloon where he sold the liquor in question was in a part of the city not given up exclusively to family residences, and was given up to any commercial business, then such sale was not in the residence portion of the city, and the sale was not a violation of the ordinance.

Such an instruction is so clearly wrong that little need be said to demonstrate it. If that instruction be correct, then the ordinance and all ordinances enacted pursuant to the enabling act of the legislature must be self-destructive or inoperative, because, as soon as a saloon opens in the residence portion of a city, that portion of the city immediately ceases to be the residence portion of the city, because thereafter it is not exclusively given up to family residences.

Instruction number ten, given by the court, is also complained of. It told the jury that "if a certain part of the city, large or small, is principally and chiefly used for residence purposes, families residing and having their homes therein, such part of the city would not become a business portion of the city merely because a grocery or other business was here and there carried on therein. The decided preponderance of residences and families residing therein determines the character of said portion of the city."

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If that is not a correct statement of the law upon the subject, then it seems to us that there is no fair way of determining what is meant in the statute, and the ordinance authorized thereby, in the use of the words "residence portion of such city." Does one family grocery in the residence portion of a city convert that portion into what the statute means by the words "the business portion of such city?" And does one family residence in the business portion of a city convert that part thereof into a residence portion of such city? Most certainly not. Because if both of these questions may be answered in the affirmative, then it will appear that in very rare instances will any city have either a business portion or a residence portion thereof. In other words, all parts of all cities will be residence portion, and the same parts will be business portions thereof. This makes nonsense out of the language of the statute and the ordinance. The framers of the statute and of the ordinance must have had in mind the common understanding of the import of the words or phrases used in "business portion" and "residence portion" of a city. And that idea was correctly enough expressed in the instruction so that the jury could apprehend it. Complaint is made of instruction No. 11 given by the court as follows:

"A family residing in a dwelling house as a family residence, may furnish board and lodging to boarders who may occupy with the family a part of such residence, and such use for a dwelling house will not change the character of such dwelling from a residence to a business house." Webster's definition of the word "business" is "constant employment; regular occupation; as the business of life; business before pleasure."

In view of the general scope and intent of the statute and ordinance, we think the court did not err in

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telling the jury that keeping boarders in one's residence or dwelling house does not convert the same into a business house.

In the sixth instruction given by the court, the jury were told that in determining the question whether the appellant sold the liquor to be used upon the premises, they might consider the quantity sold, the manner of its delivery, the vessel used, if any, to deliver it, and whether the same was drunk upon the premises in the presence of the defendant without objection upon his part, together with all other circumstances bearing upon the question. Counsel concede that the court could lawfully tell the jury that in determining the question they might take into consideration all the attending circumstances, but that it was error to name the circumstances that they might consider.

There is nothing in the objection. So long as the circumstances named were such as the jury might consider, and counsel do not deny that they were, and so long as the court did not tell the jury that they were bound to consider them, and each one of them, the court did not invade the province of the jury. *Rater v. State*, 49 Ind. 507.

The next point made in appellant's brief for a reversal is that the trial court erred in overruling appellant's objection to the introduction in evidence by the appellee of a prepared map, illustrating the portion of the city where appellant's saloon was situated as to residences and business in that locality. The objection was that there was no sufficient evidence that the map was correct. Though in his motion for a new trial appellant assigned thirty-nine causes therefor, he failed to assign this as one of them, as we may presume, because he thought he had enough without it. So if there was anything in the objection which we need not and do not decide, he has waived it by failing

to make it one of the grounds of his motion for a new trial.

The witness, True, was asked whether the location of appellant's saloon was within the corporate limits of the city of Muncie, to which he answered, over appellant's objection, that it was. The objection was that it asks the witness for an opinion, a judgment, and not a statement of any fact. It is settled law in this State that it is a question of fact, whether or not a particular locality is within the limits of a city. *Grusenmeyer v. City of Logansport*, 76 Ind. 549-552; *City of Indianapolis v. McAvoy*, 86 Ind. 587-589; *Strosser v. City of Fort Wayne*, 100 Ind. 443-447.

There are other instructions, the giving of which on the one hand, and the refusal of others on the other, have been presented by the record and appellant's brief, likewise the admission and rejection of evidence, to all of which rulings exceptions were taken by appellant. But the points already decided as to the validity of the ordinance, instructions, and admissibility of evidence are decisive in favor of appellee of all the other rulings, exceptions on instructions, admission and rejection of evidence not already set forth above.

The appellant also complains that the evidence is not sufficient to support the verdict.

We find that part of the evidence which tends to support the verdict amply sufficient. And under such circumstances it makes no difference how strong the opposing evidence may seem to us to be, we cannot weigh and determine where the preponderance thereof is.

A large amount of needless labor has been imposed on us in this case by the counsel on either side adopting a different order of presenting points relied on in their briefs. The appellant's brief, consisting of 84

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large printed pages, was followed by the court in the order in which the points were presented. As each point was reached and considered, it was found that the appellee's brief presented the answer in a different order to that adopted by appellant, so that to get any benefit from appellee's brief, consisting of about 70 large printed pages, it was necessary to look over almost the whole of that brief once for every point decided. So that it became more difficult frequently to find what appellee had to say upon the point and its authorities than to go to the books and look them up ourselves.

Finding no available error in any of the points made for reversal, the judgment is affirmed.

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GOUGAR v. TIMBERLAKE ET AL.

[No. 17,760. Filed Feb. 24, 1897. Rehearing denied May 21, 1897.]

**ELECTIONS.—*Woman Suffrage.—Constitutional Law.***—The provision of article 2, section 2, of the state constitution that "in all elections not otherwise provided for by this constitution, every male citizen of the United States of the age of twenty-one years and upward \* \* \* shall be entitled to vote," is not a grant which merely limits or restricts the right to vote, but is a political privilege expressly granted to the class of persons therein specified, and which does not exist except as it is given by the constitution and written laws of the State. *pp. 39, 40.*

**SAME.—*Suffrage.—Constitutional Law.***—The right of suffrage is not given by the federal constitution but by the State. *p. 47.*

**SAME.—*Woman Suffrage.—Constitutional Law.***—The general rule of construction, that which is expressed makes that which is silent cease, applies to article 2, section 2, of the state constitution, which gives to male citizens in express terms the right to vote. *p. 48.*

From the Tippecanoe Superior Court. *Affirmed.*

*H. B. Sayler, S. M. Sayler, J. M. Sayler, Helen M. Gougar and John D. Gougar, for appellant.*



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*A. A. Rice and W. S. Potter, for appellees.*

HACKNEY, J.—The question in this case is, have women, under existing laws in this State, the privilege of suffrage, or is sex a qualification upon the right to vote for public officers?

The constitution of this State, article 2, section 2, provides that, "In all elections not otherwise provided for by this Constitution, every male citizen of the United States, of the age of twenty-one years and upward," etc., "shall be entitled to vote," etc. The statute as to the qualification of electors, section 6192, Burns' R. S. 1894, is substantially in the language of the constitution cited. It will be observed that the language employed grants to males the right to vote, and that it does not expressly negative the privilege to female citizens.

In this respect our constitution is like that of every state in the Union, and proceeds upon the assumption that the privilege of voting is not an inherent or natural right, existing in the absence of constitutional and legislative grant and to be limited or restricted only by constitutional or legislative provision. If this assumption is correct, and there is no right of suffrage except as it is given by the constitution and written laws, we have reached the solution of the question at issue. Back of the constitution, and resting with those having the power to make and unmake constitutions, is the fountain and source of all power. From that source we receive such political rights as we possess, and our concurrence in the constitution is our consent to such an abridgment of our natural rights as that sacred instrument may contain. If suffrage is a natural right, it is not abridged as to any citizen on account of sex, but if it is a political privilege it is held only by those to whom it is granted.

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That it is a political privilege and not a natural right has been affirmed, not only in this assumption of the framers of every constitution in the land, but it has been declared by all authority and precedent without exception.

Judge Cooley, in his *Principles of Constitutional Law*, p. 248, declares that "participation in the suffrage is not of right, but it is granted by the state on a consideration of what is most for the interest of the state. Nevertheless, the grant makes it a legal right until it is recalled, and it is protected by the law as property is." Again he says, p. 259, "During the last quarter of a century, while the agitation for an enlargement of civil rights has been violent, sentiment has had a great and extraordinary influence on public affairs in America. It has much affected the discussion of political privileges, and considerable numbers have insisted that suffrage was a natural right, corresponding to the right to life and liberty, and equally unlimited. Unless such a doctrine is susceptible of being given practical effect, it must be utterly without substance; and so the courts have pronounced it." One of the reasons for this conclusion, said by the distinguished jurist to be insurmountable, is, that "suffrage cannot be the natural right of the individual, because it does not exist for the benefit of the individual, but for the benefit of the state itself. Suffrage is participation in the government: in a representative country it is taking part in the choice of officers, or in the decision of public questions. \* \* \* The purpose is therefore public and general, not private and individual. \* \* \* Suffrage must come to the individual, not as a right, but as a regulation which the state establishes as a means of perpetuating its own existence, and of insuring the people the blessings it was intended to secure." *Id.* p. 260. See to the

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same effect, Cooley's Const. Lim. (6th ed.), p. 752; Story on the Constitution (5th ed.), ch. 9, sections 577-584; Black's Constitutional Law, p. 466; 2 Burgess Political Science, p. 110; *Minor v. Happersett*, 21 Wall. (U. S.) 162; *Anderson v. Baker*, 23 Md. 531; 2 Lieber's Miscellaneous Writings, pp. 204, 205; *Bloomer v. Todd*, 3 Wash. T. 599, 19 Pac. 135; *Morris v. Powell*, 125 Ind. 281; 2 Bryce's Am. Com., p. 437.

Black, *supra*, says: "It has sometimes been contended that the right to take part in the administration of government or in the choice of those who are to make and execute the laws, by means of the ballot, is a natural right, standing in the same category with the rights of life, liberty, and property. \* \* \* But it remains not less true that the right of suffrage is not a natural right, but a political right; not a personal right, but a civil right. It does not owe its existence to the mere fact of the personality of the individual, but to the constitution of civil government. Nor is it even a necessary attribute of citizenship. These principles are established by the following considerations. First, the exercise of an absolutely universal suffrage would imperil the very continuance of the government. Second, the right of suffrage does not exist for the benefit of the individual, but for the benefit of the state itself. Third, there have been restrictions upon the suffrage in all democratic or republican governments known to history, even the most free."

After presenting some of the reasons for and against a more universal suffrage, Mr. Justice Story, section 581, *supra*, says: "Without laying any stress upon this theoretical reasoning, which is brought before the reader, not so much because it solves all doubts and objections, as because it presents a view of the serious difficulties attendant upon the assumption of an original and unalienable right of suffrage, as originating

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in natural law, and independent of civil law, it may be proper to state that every civilized society has uniformly fixed, modified, and regulated the right of suffrage for itself, according to its own free will and pleasure." Again he says, in concluding section 582, "So that we have the most abundant proofs that among a free and enlightened people, convened for the purpose of establishing their own forms of government and the rights of their own voters, the question as to the due regulation of the qualifications has been deemed a matter of mere state policy, and varied to meet the wants, to suit the prejudices, and to foster the interest of the majority. An absolute, indefeasible right to elect or be elected seems never to have been asserted on one side or denied on the other; but the subject has been freely canvassed as one of mere civil polity, to be arranged upon such a basis as the majority may deem expedient with reference to the moral, physical, and intellectual condition of the particular state."

Dr. Lieber says, *supra*, "The adoption of universal suffrage has led many persons to the belief and broad assertion that the right of voting is a natural right, and if it is a natural right, it ought, as a matter of course, to be extended to women; while, on the other hand, many persons seem to profess that no qualification whatever \* \* \* should be demanded as a requisite for the right of voting. All these are erroneous conceptions. \* \* \* But how can so special a right as that of voting for a representative be a natural right, when the representative government itself is something that does not spring directly from the nature of man, however natural it may be in another sense of the word—that is to say, consistent with the progress of civilization? It is the latest and highest of all civilized governments; but where was

the natural right of suffrage under the patriarchal government—in the Mosaic commonwealth, founded on a hereditary and priestly nobility; where in the Asiatic despotism—types of government necessary in their season—when nothing and nobody was voted for? \* \* \* The representative system is the only means of protecting individual liberty, and preventing democratic despotism. The right of suffrage, therefore, is a noble right, or ought to be so; but it is not a natural right. It is a political right, to which Providence has led man in the progressive course of history.”

In *Morris v. Powell*, 125 Ind. 281, 315, this court said: “It is because this right of suffrage is a political right, abiding in the fountain of power, that the legislature cannot lay so much as a finger upon it, except when expressly authorized by the organic law, and for this reason it is that the legislature cannot make a classification of its own, no matter whether there is or is not equality. It is because the right of suffrage is a political right, as has been decided by the Supreme Court of the United States, and by other courts, that the provisions of the Constitution respecting the bestowal of special privileges and immunities have no application to legislation upon the subject.”

Our constitution sought to establish a representative government, a government wherein only limited numbers express the will of all the people; and it was declared that those to represent the whole number should be males, possessing the qualifications enumerated. The government thus established is but the agent or trustee of the State, the people; and it has derived its authority through the constitution. In forming this government the people declared that their authority should be exercised by and at the command of males of a designated class. That the exercise of

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such authority may be entrusted to enlarged classes with fewer restrictions, there is and can be no doubt; but to do so is with those who gave the authority, the people; and it is no more within the power of the judicial or the legislative branch of the government to modify the will of the people as expressed in the constitution, than it is for the agent, in any case, to stand above the principal in authority.

As said in *Morris v. Powell, supra*, "The right of suffrage is one for the consideration of the people in their capacity as creators of constitutions, and is never one for the consideration of the legislature," and we may add, of the courts, "except in so far as the constitution authorizes a regulation of its mode of exercise. The people create, define, and limit their own right to vote."

Those of us who have come into the State since the adoption of the constitution, and those who did not vote for its adoption, as well as those who may have voted against its adoption, are alike bound by its provisions, and we can exercise no political or governmental right or privilege which is not given by it. Such privilege as that of suffrage was not given to women; and if it only exists by grant, as we have shown, it must be admitted that those to whom it was given may exercise it as the agents of the State, the whole people, males and females, not possessing it. If an agency exists which is contrary to our ideas of advancing civilization and the highest sense of liberty, our privilege is to change it, but only through the authority of the principal, the State.

That the privilege of voting does not exist in the absence of grants from the people or their authorized representatives, is consistent with the decisions which declare that legislatures may not abridge the privilege as declared in the constitutions by adding restric-

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tions or limitations not therein defined. *Green v. Shumway*, 39 N. Y. 418; *McCafferty v. Guyer*, 59 Pa. St. 109; *People v. Canaday*, 73 N. C. 198; *Monroe v. Collins*, 17 Ohio St. 665; *Rison v. Farr*, 24 Ark. 161; *Randolph v. Good*, 3 W. Va. 551; *Brown v. Grover*, 6 Bush 1; *State v. Williams*, 5 Wis. 308; *State v. Baker*, 38 Wis. 71; *Davies v. McKeeby*, 5 Nev. 369; *Clayton v. Harris*, 7 Nev. 64; Cooley's Con. Lim. (6th ed.), p. 753; Black on Const. Law, p. 471; *Morris v. Powell*, 125 Ind. 281; *Quinn v. State*, 35 Ind. 485. See, also, *Feibleman v. State*, 98 Ind. 516, where the same principle is adhered to.

Giving full force to the decisions of this court just cited, there is no escape from the conclusion that sex is one of the qualifications, under our constitution, upon the privilege of suffrage. It was held in *Morris v. Powell*, and *Quinn v. State* that the qualifications specified in the constitution could not be enlarged or diminished, and in the former it was particularly pointed out that sex was a qualification. Not only do authority and the assumption by all of the states, in the form of their grants of suffrage, establish the theory that the privilege exists only with those to whom it is expressly given, but it is supported by the fact that if it should be held that females were not denied the privilege, there would be an entire absence of restriction upon the privilege as to them. Age, residence, and naturalization, would be required of males; but as to females, the youngest and the oldest, nonresidents, aliens and all, there would be no restriction. If intention should be considered as a rule of construction, and it is always of first importance, there could be little doubt that the framers of the constitution did not intend any such consequences.

The direct question before us has frequently been

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decided by courts of the highest authority. *Spencer v. Board, etc.*, 1 MacArthur 169; *Van Valkenburg v. Brown*, 43 Cal. 43; *Minor v. Happersett, supra*; *Bloomer v. Todd, supra*; *United States v. Anthony*, 11 Blatchf. 200.

It is insisted further that the fourteenth amendment to the constitution of the United States secures to the appellant the elective franchise. The provision referred to is that "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law, nor to deny any person within its jurisdiction the equal protection of the laws."

If this amendment had created universal suffrage, there would have been no need for the fifteenth amendment, which provides that "the right of the citizens of the United States to vote shall not be denied or abridged by the United States, or by any State, on account of race, color, or previous condition of servitude." Judge Cooley says, "The constitution of the United States confers the right to vote upon no one. That right comes to the citizens of the United States, when they possess it at all, under state laws, and as a grant of state sovereignty. But the fifteenth amendment confers upon citizens of the United States a new exemption, namely, an exemption from discrimination in elections on account of race, color, or previous condition of servitude." Principles of Constitutional Law, *supra*, p. 277. In the same work, p. 274, he says: "The second clause of the fourteenth article was intended to influence the states to bring about by their voluntary action the same result that is now accom-



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plished by this amendment. It provided that when the right to vote was denied to any of the male inhabitants of a state, being twenty-one years of age and citizens of the United States, or in any way abridged except for participation in crime, the basis of representation in Congress should be reduced in the proportion which the number of such male citizens should bear to the whole number of male citizens twenty-one years of age in such state. By this, the purpose was to induce the states to admit colored freemen to the privilege of suffrage by reducing the representation and influence of the States in the federal government, in case they refused." That suffrage is not given by the federal constitution, but is the right of the states. See, also, Story, *supra*, section 1932; Black, *supra*, 467; *Minor v. Happersett*, *supra*; *Bloomer v. Todd* (Wash.) 1 L. R. A. 111; *United States v. Reese*, 92 U. S. 214; *United States v. Cruikshank*, 92 U. S. 542; *United States v. Crosby*, 1 Hughes 448; *Kinneen v. Wells*, 144 Mass. 497, Desty. Fed. Const. 287; *Huber v. Reiley*, 53 Pa. St. 112; *United States v. Anthony*, *supra*; *Spencer v. Board*, *supra*; *Spragins v. Houghton*, 3 Ill. 377; *Anthony v. Halderman*, 7 Kan. 50; *Van Valkenburgh v. Brown*, 43 Cal. 43, 13 Am. Rep. 136.

It is upon this theory alone that the great variety of provisions with reference to suffrage and the qualifications upon the privilege is found in the several constitutions of the states, and, although not always in accord, they are not in conflict with the constitution of the United States. Appellant is in error in assuming that citizenship and suffrage are by the federal constitution made inseparable. Many are citizens, and not voters, unless we may hold that the state constitution does not discriminate against persons on account of age, residence, etc., and that disfranchisement for

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crime, etc., may not be made by law. Nor do negroes get their right of suffrage, under the fourteenth and fifteenth amendments to the constitution, simply by reason of citizenship, as appellant earnestly insists. The fifteenth amendment, as we have shown, takes from the state the right, in extending the privilege of suffrage, to discriminate against citizens "on account of race, color or previous condition of servitude." It cannot be said, therefore, that the constitution of Indiana is in conflict with the fifteenth amendment in discriminating against the appellant on account of sex.

By the language of all of the constitutions, which but affirms the right of voting to those intended to possess it; by the holdings of the courts passing upon the question of the origin, existence, and grant of political privileges, including the decisions cited from this court, and upon the reasoning of those eminent authors who have written upon constitutional law, it must be held that the general rule of construction, that that which is expressed makes that which is silent cease, applies in the case before us.

It is insisted, however, against this conclusion, that the decision of this court, *In re Leach*, 134 Ind. 665, denies the application of the rule or maxim *Expressio unius, exclusio alterius*.

That case involved the right of women, possessing the qualifications required by the rules of the court in which they sought to practice law, to be admitted to practice in the profession of the law in such court. The constitution, as to the practice of law, extended the right to voters, and as to others was silent. The maxim quoted was there denied application, because, as it was believed, the right to practice law was not a political question, was governmental in no respect, but that it belonged to that class of rights inherent in

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every citizen, and pertained to the fundamental duty of every inhabitant to gain a livelihood; that this duty involved the privilege of choosing any honorable vocation or profession not forbidden by law, and recognizing the existing right of the people, in the constitution or by legislation, to regulate the manner of pursuing that vocation or profession. Constitutions had not recognized the practice of an honorable profession as a governmental question. Throughout the ages it had been deemed proper, in the interest of the public, that legislative regulation of the legal profession might be enacted and enforced. It was, therefore, believed that the constitutional grant of the privilege of practicing law to a class was not intended as a denial of the right to others. It was not thought that the grant was more than a measure of regulation as to the class especially mentioned, nor that it was in effect an inhibition as to others. Judge Cooley says (Const. Lim., 484): "To forbid to an individual or a class the right to the acquisition or enjoyment of property in such manner as should be permitted to the community at large, would be to deprive them of *liberty* in particulars of primary importance to their 'pursuit of happiness;' and those who should claim a right to do so ought to be able to show a specific authority therefor, instead of calling upon others to show how and where the authority is negated."

In Story on the Constitution, section 1934, it is said that the right "to acquire, possess, and enjoy property," and "to choose from those which are lawful the profession or occupation of life," are among the privileges which the states are forbidden, by the constitution of the United States, to abridge. *In re Leach, supra*, we do not regard as an authority upon the question before us.

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We are not prepared to say, under the existing social conditions, considering the marked intellectual advancement of women since the adoption of the present constitution, that the elective franchise should not be given them. There are many questions to be settled by the ballot which would enlarge the sphere of freedom, would advance the morals and lighten the burdens of humanity, would redeem homes from the wreckful influences of intemperance, and would stay the mad pace of partisan bias and corruption. But to what extent the ballot in the hands of women would tend to increase or to destroy their present great influence in the affairs of man, the home, and the state cannot be known in advance of the experiment.

Whatever the personal views of the judges upon the advisability of extending the franchise to women, all are agreed that under the present constitution it cannot be extended to them.

The judgment of the lower court, in sustaining the demurrer of the appellees to the appellant's complaint for damages in denying her the right to vote, is affirmed.

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SHELL v. THE STATE.

[No. 17,953. Filed May 21, 1897.]

**CRIMINAL LAW.—Affidavit and Information.—Time of Commission of Offense.—Statute Construed.**—Under the provision of section 1825, Burns' R. S. 1894 (1756, R. S. 1881), the failure to state in an affidavit and information the time at which the offense was committed, or the imperfect statement thereof, is not fatal where time is not of the essence of the offense. *p. 51.*

**SAME.—Affidavit and Information.—Time of Commission of Offense.—Statute Construed.**—Section 1807, Burns' R. S. 1894 (1788, R. S. 1881), which provides that "the precise time of the commission of an offense need not be stated in the indictment or information, but it is sufficient if it be shown to have been within the statute of lim-

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itations," etc., is in aid of a liberal construction of criminal pleading, and, while not requiring a statement of the time of the commission of the offense, it renders sufficient a statement which may not be precise. *p. 52.*

**PERJURY.**—*False Oath to Affidavit and Information.*—A false oath, made before the mayor of a city, charging a person with larceny, may become the subject of a prosecution for perjury, notwithstanding no warrant was issued for the arrest of the accused and no legal steps taken in the case. *pp. 52, 53.*

From the Miami Circuit Court. *Affirmed.*

*Samuel M. Hench, Ethan T. Reasoner, John W. O'Hara and James M. Brown, for appellant.*

*W. A. Ketcham, Attorney-General, and C. C. Hadley, for State.*

**HACKNEY, J.**—The appellant, Edward L. Shell, alias Elmer E. White, was convicted of perjury upon affidavit and information in four counts. A motion to quash was made and overruled in the lower court, and that ruling is the only error assigned. The first count charged the time of the alleged offense as "on or about the 9th day of September, A. D. 1895," and each succeeding count charged it as "on the day aforesaid" or "at the time aforesaid."

It is insisted that the second, third, and fourth counts were insufficient, in stating no time, or in referring to a date stated in the first count.

In section 1825, Burns' R. S. 1894 (1756, R. S. 1881), it is provided that an information shall not be quashed "For omitting to state the time at which the offense was committed in any case in which time is not the essence of the offense." Under this provision it has many times been held that where time is not of the essence of the offense the failure to state it or the imperfect statement of it is not fatal. *Turpin v. State*, 80 Ind. 148; *State v. Sammons*, 95 Ind. 22; *State v.*

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*McDonald*, 106 Ind. 233; *State v. Patterson*, 116 Ind. 45; *Myers v. State*, 121 Ind. 15; *Fleming v. State*, 136 Ind. 149; *Armstrong v. State*, 145 Ind. 609.

But counsel for the appellant say that these cases are unsound, in that their construction of the above quoted provision of the statute brings it in conflict with section 1807, Burns' R. S. 1894 (1738, R. S. 1881), which provides that "The precise time of the commission of an offense need not be stated in the indictment or information, but it is sufficient if shown to have been within the statute of limitations," etc. The cases above cited stand upon the plain words of the statute, and if out of harmony with the latter provision in its apparent meaning, we should first look for a construction of the latter provision harmonizing with the former. This may be found in the construction that it, like section 1825, is in aid of a liberal construction of criminal pleading and, while not requiring a statement of the time of the commission of the offense, renders sufficient a statement which may not be precise. This, we have no doubt, is the proper construction of this provision, and the cases cited are properly decided.

The second, third, and fourth counts are not bad upon the ground so urged.

It is further insisted that the counts were each bad in not charging that a lawful oath was taken by the appellant in making the affidavit constituting the alleged perjury. This insistence is supported by the one proposition that the information does not charge that a prosecution was commenced, or that legal proceedings were pending, and *Smith v. State*, 125 Ind. 440, is cited as supporting the proposition. It is charged that the appellant went before the mayor of the city of Peru and made oath to an affidavit charging one Barnard with the offense of larceny, and did

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so for the purpose of procuring from said officer a warrant for the arrest of said Barnard upon said charge. A careful reading of the case of *Smith v. State, supra*, will disclose the distinction between that case and the present. Here the false affidavit was presented to, and an oath was made thereto before the officer who possessed the authority, and who was desired by the appellant, to issue a warrant for the arrest of Barnard. The act was the initial step in a prosecution for larceny, and was taken for the purpose of making it effective. So far as the appellant may have repented of his purpose, or may have been dissuaded from, or denied it, by the mayor or any other, could not atone, legally, for the offense thus completed. In the case of *Smith v. State, supra*, the false affidavit was made before a notary public, who possessed no authority to act upon it, in the sense of a legal proceeding, and it was not charged to have been made with a view to the commencement of a legal proceeding. It was not necessarily a step in any legal proceeding. The indictment was wholly deficient, as there held, in the charge of the materiality of the false matter. We do not believe it was in that case intended to decide that a false oath may not become the subject of a prosecution for perjury, where the oath is required by law, unless the oath has been acted upon in a legal proceeding. If the appellant had filed the affidavit with the mayor and no steps had been taken upon it, no warrant issued, no file mark placed upon it, nevertheless the false oath, made for the purpose of procuring legal steps, should be as effective, in characterizing the act as criminal, as if the filing had been marked upon the affidavit, a warrant had been issued, and an arrest had been made. Nothing remained for him to do to make his oath effective. When made for the purpose of procuring effective legal action, the

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act being one required by law, and that legal action depending, not upon the affiant, but upon the officer, it is sufficient upon which to charge perjury.

Finding no error in the record the judgment is affirmed.

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YOUNG v. CITIZENS' STREET RAILROAD COMPANY.

[No. 17,957. Filed Oct. 13, 1896. Rehearing denied May 21, 1897.]

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159	135
148	54
160	158

**STREET RAILROADS.—*Special Verdict.*—Contributory Negligence.**—A special verdict finding that plaintiff upon first approaching a track looked attentively for an electric street car, but saw none, although he saw for a distance of four hundred feet from him, and that he afterwards walked twenty-five feet beside the track without looking again, when he was struck by a car going at the rate of twelve miles an hour, and that there was nothing at any time to prevent his seeing and hearing, fails to show that plaintiff was free from contributory negligence. *pp. 56, 57.*

**SAME.—*Person on Track must Look and Listen.***—One is guilty of contributory negligence in walking upon or attempting to cross an electric street railway track without looking and listening. *pp. 58–60.*

**SAME.—*Injury to Person on Track.***—A person who is engaged in laying pipe for a gas company in a trench about three feet from the track of a street railway company, and, in performing his duties as an employe of the gas company, walks upon the track of the street railway company, will be regarded as an ordinary traveler, and is bound to the observance of ordinary care for his own safety. *pp. 60–62.*

**NEGLIGENCE.—*When a Question of Law.***—Where the facts are undisputed, and the inferences which may be drawn from them are unequivocal and can lead to but one conclusion, the court will adjudge, as a matter of law, that there is, or is not, negligence. *pp. 62, 63.*

From the Hancock Circuit Court. *Affirmed.*

*J. E. McCullough, H. N. Spaan, R. A. Black and Christian & Christian,* for appellant.

*W. H. Latta, W. H. H. Miller, F. Winter and J. B. Elam,* for appellee.



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MCCABE, J.—This was an action begun by the appellant against the appellee in the Superior Court of Marion county to recover damages alleged to have been sustained by the plaintiff through the negligence of the defendant. The venue was changed to the Hancock Circuit Court where the issues were tried by a jury resulting in a special verdict under the recent statute, assessing the plaintiff's damages at \$12,500.00 conditionally.

The circuit court overruled the plaintiff's motion for judgment in his favor on the special verdict, and sustained the defendant's motion for judgment thereon in its favor, and rendered judgment accordingly; and the only error assigned is upon these rulings.

The only question presented by the briefs for our decision is whether the special verdict finds facts sufficient to show that the plaintiff was free from fault or negligence contributing to his injury. He had alleged in his complaint, without which, or the substantial equivalent thereof it would have been totally insufficient, that he "did not in any manner by any negligent conduct or fault on his own part contribute to the injuries" complained of.

The special verdict is very long consisting of 156 questions and answers thereto; therefore, only the substance thereof will be given. Such substance is as follows: The defendant owned and operated an electric street railway on West Washington street running east and west in the city of Indianapolis, Indiana, extending west beyond White river, during the month of May, 1894. The line was double tracked in the middle of said street, eighty feet wide from property line to property line. The trolley wires conveying the electric power were hung on iron poles eighteen feet high, five inches in diameter at the top of the ground and three inches at the top of the poles, standing 125 feet apart,

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equidistant between the double tracks, such tracks being four feet ten inches apart. The gauge of the street-railroad tracks was four feet and eight and one-half inches.

There was a gang of men working for the Manufacturers' Natural Gas Company putting gas pipe into a trench dug about three feet north of and parallel with the north track of said street-car line. The street cars ran west on the north track and east on the south track. One of the defendant's cars running east on the south track of said line on the 15th day of May, 1894, struck appellant and inflicted the injury complained of. It seems to be conceded that the motorman was guilty of negligence in not sounding the gong as it is called, on approaching the appellant so as to warn him of danger. The car was going at the rate of speed of ten to twelve miles an hour.

For a distance of 200 feet west of the point of said collision the tracks descended three inches. Just before the collision, the plaintiff quit his work, and walked south, near to the north rail of the south track, opposite to where he had been working, and looked attentively to the west to see if any car was coming from that direction on the south track. He saw 400 feet west. There was a street car coming east. There was nothing to obstruct his vision or prevent his seeing a car coming east on Washington street.

After plaintiff walked to a point near the north rail of the south street-car track he turned and walked toward the east, twenty-five feet. After he started to walk east along or near the north rail of the south track, until he was struck by the street-car, he did not look to the west for an approaching car.

The motorman did not see him or give any warning. When he last looked west the car was 528 feet west of him. After the plaintiff quit work, and before

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the collision, he listened for an approaching street car. There was nothing to prevent the plaintiff from hearing the approach of the street car with which he collided before the collision, and he was not prevented from hearing it. The verdict states that plaintiff was facing east when he was struck, and yet it states that the left side of the car struck him on his left side. That was impossible, if he was facing east. He must have been facing west, toward the approaching car, or at least facing north or northeast.

The 122d and 123d interrogatories and answers thereto are as follows: "122. Did the plaintiff at said times or either of them, see any street car approaching from the west, or on said south track? Ans. No. 123. Did he at said times look as far west as 300 or 400 feet? Ans. Yes." And the 131st interrogatory and answer read as follows: "Did he hear said car, or gong thereof, as it approached at the time he was struck? Ans. No." Another interrogatory and answer was as follows: "53. If he looked, was there anything to obstruct his vision, or prevent his seeing a car coming east on Washington street? Ans. Line poles."

If this answer is to be construed as contradicting that answer saying that there was nothing to prevent him seeing the car coming on Washington street, it would have the effect to destroy both answers, and leave the finding blank on that question. But the answers are not irreconcilable. The first says there was nothing to prevent him from seeing the car, while the answer to the question in the other case, as to whether there was anything to obstruct his vision or prevent him from seeing the car, is "line poles." These line poles may have partially obstructed his vision, and partially prevented him from seeing the approaching car, but it does not seem possible that they could have wholly done so. Therefore, it seems but reasonable

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that that is what the jury meant by that answer, and not to answer in direct contradiction of their other answer that there was nothing to prevent him seeing the car. This construction of the verdict seems imperatively required, because the burden rested on the plaintiff to affirmatively show that he was free from contributory negligence, as much as to show that the defendant was guilty of negligence.

Our construction of the verdict is that it shows that there was nothing to prevent the plaintiff from both seeing and hearing the approaching car. And as was said in *Ohio, etc., R. W. Co. v. Hill*, 117 Ind., at p. 61: "If a traveler, by looking, could have seen an approaching train in time to escape, it will be presumed, in case he is injured by collision, either that he did not look, or if he did look, that he did not heed what he saw. Such conduct is held negligence *per se*."

And as was also said in *Cones v. Cincinnati, etc., R. Co.*, 114 Ind., at p. 330, that: "The law will assume that he actually saw what he could have seen, if he had looked, and heard what he could have heard, if he had listened. To the same effect are *Lake Erie, etc., R. R. Co. v. Stick*, 143 Ind. 449.

Counsel for appellant concede the rule as above stated to be well settled in this State, but contend that it is not applicable to street railroads. In all cases ordinary care only for one's own safety is required to exonerate him from the charge of contributory negligence; and it is also true, that what is ordinary care under one set of circumstances might amount to negligence under a different set of circumstances.

Ordinary care is such care as a person of ordinary prudence exercises under the circumstances of the danger to be apprehended. The greater the danger the higher the degree of care required to constitute

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ordinary care, the absence of which is negligence. But it is a question of degree only. The kind of care is precisely the same.

Merely because steam railroad trains are heavier and more difficult to control than an electric street car on a street railroad, is no reason why a person on such street-car line is excused from the duty of stepping off or away from the track on the approach of the electric car.

In *McGee v. Consolidated Street R. W. Co.*, 102 Mich. 107, 60 N. W. 293, the Supreme Court of Michigan said: "The city authorities recognized the necessity of rapid transit, and limited the cars on that street to fifteen miles per hour. These cars are heavy, laden with motors, and they cannot at once be stopped. They have no right to run down pedestrians, but those in charge have a right to suppose that pedestrians will not walk upon the track without looking to see if a car is coming. It is well known that these crossings are places of danger, and that cars do not stop at every crossing. Here the custom was to stop on the opposite crossing from where the plaintiff was. . \* \* \* He was bound to look both ways before getting on the track. It will not do to say that he acted prudently and carefully in looking before getting off the curb, and was, therefore, not bound to look again because he saw no car coming from the north at that time. A car coming at fifteen miles would pass a great distance while a pedestrian was going thirteen feet ten inches. The plaintiff was bound to look before stepping upon a place of danger."

And so in this case, a car coming at a speed of twelve miles an hour could come a great distance while plaintiff was walking east along the track twenty-five feet, during which time he made no attempt to look west.

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And the Michigan Supreme Court in the case named, further said: "It is said by counsel for plaintiff that, while this may be the rule [as to duty to look and listen] in regard to steam railways, it cannot be applied to street railways. \* \* \* We see no more reason for applying the rule that one must look and listen before crossing the tracks of a steam railway than that one must look and listen before crossing a street-car track upon which the motive power is electricity or the cable. In this State it is well settled that persons passing over railroad crossings must exercise care. They must look and listen, and, under certain circumstances, must stop, before attempting to cross. Electric street-car crossings are also places of danger. The cars are run at a great speed on this street in question. The city ordinance permits it, and the rule must be that, before going upon such tracks, every person is bound to look and listen." To the same effect are *Blakeslee v. Consolidated Street R. W. Co.*, 105 Mich. 462, 63 N. W. 401; *Fritz v. Detroit, etc., Street R. W. Co.*, 105 Mich. 50, 62 N. W. 1007; *Carson v. Federal Street, etc., R. W. Co.*, 147 Pa. St. 219, 23 Atl. 369; *Hickey v. St. Paul City R. W. Co.*, 60 Minn. 119, 61 N. W. 893.

We are, therefore, of opinion that the special verdict fails to show that the plaintiff was free from contributory negligence and that the circuit court did not err in overruling appellant's motion for judgment in his favor on the special verdict, and did not err in sustaining the appellee's motion for judgment in its favor on the special verdict and in rendering judgment in its favor upon such verdict.

The judgment is affirmed.

ON PETITION FOR REHEARING.

MCCABE, J.—The principal contention in support

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of the petition for a rehearing is that we erred in applying the same rule to the acts of the appellee, as to contributory negligence, that is applicable to the ordinary traveler over the streets. It is contended with much vigor and ability that the authorities cited in support of the original opinion are not applicable because they, it is insisted, apply to and announce the rule applicable to ordinary travelers. That appellant was not an ordinary traveler or pedestrian over the street, and, hence, a different rule should be applied to him.

Appellant's principal contention in his original brief was, that there is a distinction between negligence cases against steam railways and street railways as to the degree of care required of the complaining party. But now his principal contention is that he was not an ordinary traveler, and, hence, the rule in such cases is not to be applied to him; and *Shoner v. Pennsylvania Co.*, 130 Ind. 170, and a large number of cases of that class are cited in support of the contention. That case and the class of cases cited in it, and those cited by appellee's learned counsel, are cases where the defendant company had employed the plaintiff to work on the track of its railroad, or in other positions exposed to danger, making it the duty of the servant to give his attention to his work, and especially where such duty is of an absorbing nature liable to engross the entire attention of the servant. There can be no doubt that in that class of cases the law exacts a greater degree of care and caution on the part of the master, and a much less degree on the part of the servant than in other cases. It would be extremely unjust, and therefore unlawful, to permit the master to require of his servant the performance of duties on the track of its railroad, the very nature of which must necessarily engross his whole mind and

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attention, and then require of him, while thus engaged, the same close observation for his safety that would be required of him in other cases.

But no such case is presented here, and no such relation existed. The appellant owed no duty to the appellee, and *vice versa*. The appellant was engaged, it is true, in laying gas pipe in a trench about three feet north of the north track of the appellee's street railway, but he was in the employ of another and an entirely different corporation, the Manufacturers' Natural Gas Company. If in his work he found it convenient to use the appellee's street railroad track to walk up and down, back and forward, or across the same, he used it as all other people had a right to use it. He used it because it was a part of a public street, subject to which user the company held its franchise; otherwise he would have been a trespasser. He used it just as any other person had a right to use it. It was not the work he was engaged in that gave him the right to use the appellee's track, but it was because the track was a part of a public street, and the public had a right to use it as such, subject to the superior right of the company as to priority of passage.

He stood then in the same category of the baker, the merchant, or the grocer, or any other member of the public who sends his servant out to deliver goods or perform any other service, and such servant finds it convenient to travel on the appellee's street railway track. All such persons must be held to be ordinary travelers, and as such, bound to the observance of ordinary care for their own safety. This duty it is tacitly conceded that appellee did not discharge.

It is next repeatedly urged that the jury expressly found that the plaintiff was free from negligence; and it is further urged that the question of negligence or no negligence is a question of fact and not of law. The



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very case counsel have cited and relied on, both in their original brief and the one in this petition, namely, *Shoner v. Pennsylvania Co.*, *supra*, states the law very differently, thus: "In cases involving questions of negligence, the rule is now settled that, where the facts are undisputed, and the inferences which may be drawn from them are not equivocal, and can lead to but one conclusion, the court will adjudge, as matter of law, that there is, or is not, negligence. While in cases where the facts are disputed, or where they are equivocal, the question of negligence must be determined by the jury under proper instructions. *Baltimore, etc., R. R. Co. v. Walborn*, 127 Ind. 142; *Mann v. Belt R. R., etc., Co.*, 128 Ind. 138, and authorities cited in each. See, also, *Rogers v. Leyden*, 127 Ind. 50, where a full citation of authorities will be found." See, also, *Rush v. Coal Bluff, etc., Co.*, 131 Ind. 135; *Cleveland, etc., R. W. Co. v. Harrington*, 131 Ind. 426; *W. C. DePauw Co. v. Stubblefield*, 132 Ind. 182; *Cincinnati, etc., R. W. Co. v. Grames*, 136 Ind. 39; *Smith v. Wabash, etc., R. R. Co.*, 141 Ind. 92; *Board, etc., v. Bonebrake*, 146 Ind. 311.

It is not even claimed, nor is it true, that the inferences arising from the facts found were equivocal, or that two persons equally intelligent and impartial might draw different conclusions or inferences from the facts found; and as the special verdict has settled the facts, they are no longer in dispute, nor is it even claimed by appellee's learned counsel that they are any longer in dispute. The question of negligence or no negligence on the appellant's part, contributing to his injury, is, therefore, purely a conclusion of law, to be drawn by the court from the facts found by the jury; and, hence, the statement of such inference or legal conclusion by the jury has no force.

Petition overruled.

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Lucas et al. v. Herbert et al.

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## LUCAS ET AL. v. HERBERT ET AL.

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[No. 18,127. Filed May 21, 1897.]

RAILROADS.—*Depot and Grounds.*—*Hack Stands.*—Railroad companies have the right to make and enforce reasonable rules and regulations in regard to their stations and grounds, and may designate the stand that hacks and omnibuses shall occupy on such grounds. p. 67.

HARMLESS ERROR.—*Practice.*—No error was committed in sustaining a demurrer to certain paragraphs of answer, where the same evidence could be and was given under a remaining paragraph of answer. p. 68.

From the Knox Circuit Court. *Reversed.*

G. W. Buff, W. R. Nesbit, W. S. Maple and W. H. De Wolf, for appellants.

Briggs & Lindley and John S. Bays, for appellees.

MONKS, J.—This action was brought by appellees, to enjoin appellants from interfering with appellees in the use of a certain part of the depot grounds of the Evansville & Terre Haute Railroad Company, being twenty-one feet north and south along the platform, and twenty-eight feet running west from the platform. Appellants filed three paragraphs of answer to the complaint. Appellees' demurrer to the first and second paragraphs of answer was sustained. A trial by the court resulted in a finding, and, over a motion for a new trial, a judgment in favor of appellees.

It appears from the evidence that appellants were engaged in the livery business, and for several years had been running a bus line to and from the depot carrying passengers and baggage, and during all of

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said time had occupied the part of the depot grounds in controversy, for the purpose of discharging and receiving passengers and baggage, and standing their buses and baggage wagons while awaiting the arrival and departure of trains. The part of the depot platform used by appellants was twenty-one feet in length, and wide enough to stand three buses or two buses and a baggage wagon. This space, twenty-one by twenty-eight feet, was leased to appellants by the railroad company for that purpose, at an annual rental of \$15.00, the railroad company reserving the right to cancel the lease at any time. Appellants drove their baggage wagon and one or two buses, as the demands of travel required.

A short time before the commencement of this action, appellees engaged in the livery business, and began running a bus line to and from the depot for the carrying of passengers and baggage, driving one bus and a baggage wagon. There was a controversy between appellants and appellees as to the right to occupy the part of the depot grounds theretofore used by appellants; the railroad company and appellants offered to assign the north one-third of the space adjacent to the platform to appellees, being seven by twenty-eight feet, upon which to stand their bus, and receive and discharge passengers and baggage; this offer was refused by appellees, they demanding that the north one-half of the ground in controversy be assigned to them. Appellees offered to accept the space indicated, if appellants would only run one bus, this proposition was refused by appellants.

We are not required in this case to determine whether a railroad company can grant the exclusive privilege to one of several competing omnibus lines to occupy the depot grounds with its vehicles, and so-

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Lucas *et al.* v. Herbert *et al.*

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licit the patronage of incoming passengers, or the exclusive right to use its platform and grounds for the receiving and discharging of passengers and baggage. These questions are regulated in some states by constitutional and statutory provisions; the decisions of the courts, however, are conflicting as shown by the following cases: *Old Colony R. R. Co. v. Tripp*, 147 Mass. 35, 17 N. E. 89; *Com. v. Carey*, 147 Mass. 40, 17 N. E. 97; *Com. v. Power*, 7 Metc. (Mass.) 596, 41 Am. Dec. 465, and note; *Barney v. Oyster Bay Steamboat Co.*, 67 N. Y. 301, 23 Am. Rep. 115; *New York Central, etc., R. R. Co. v. Flynn*, 74 Hun. 124, 26 N. Y. Supp. 859; *New York Central, etc., R. R. Co. v. Sheeley*, (Sup.) 27 N. Y. Supp. 185; *Smith v. Railroad Co.*, 149 Pa. St. 249, 24 Atl. 304; *Fluker v. Georgia R. R., etc., Co.*, 81 Ga. 461, 12 Am. St. 328, and note, 2 L. R. A. 843; *Harris v. Stevens*, 31 Vt. 79, 73 Am. Dec. 337; *Landrigan v. State*, 31 Ark. 50, 25 Am. Rep. 547; *Griswold v. Webb*, 16 R. I. 649, 7 L. R. A. 302, and note; *Barker v. Midland R. W. Co.*, 18 C. B. 45, 86 E. C. L. 45; *Hole v. Digby*, 27 Weekly. Rep. 884; *Painter v. London, etc., R. W. Co.*, 2 C. B. (N. S.) 701, 89 E. C. L. 701; *Beadell v. Railway Co.*, 2 C. B. (N. S.) 509, 89 E. C. L. 509; *Marriott v. London, etc., R. W. Co.* 1 C. B. (N. S.) 489, 87 E. C. L. 498; *Cole v. Rowen*, 88 Mich. 219, 50 N. W. 138, 13 L. R. A. 848, and note; *Hack and Bus Co. v. Sootsma*, 84 Mich. 194, 47 N. W. 667, 10 L. R. A. 819, 22 Am. St. 693, and note p 699; *Cravens v. Rodgers*, 101 Mo. 253, 14 S. W. 106; *Montana Union R. W. Co. v. Langlois*, 9 Mont. 419, 18 Am. St. 745, and note, 8 L. R. A. 753, and note; *Markham v. Brown*, 8 N. H. 523; *McConnell v. Pedigo*, 92 Ky. 465, 18 S. W. 15, 23 Am. and Eng. Ency. of Law, 126, and cases cited in note 3, pp. 126, 127.

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The question here is, has a railroad company the right to designate the place abutting on the platform where the owners of competing omnibus lines shall stand their vehicles while awaiting the arrival and departure of trains, and where they shall receive and discharge passengers and baggage? It is settled that railroad companies have the right to make and enforce reasonable rules and regulations in regard to their stations and grounds, as to who shall enter upon the same, and how they shall conduct themselves while there. 19 Am. and Eng. Ency. of Law, 820; 23 Am. and Eng. Ency. of Law, 124, 126. This includes the right to make reasonable rules and regulations to prevent quarrels between the owners of competing omnibus lines and their employes, while upon the depot grounds. For this purpose a railroad company may, if it admits omnibuses and hacks to its grounds, designate the stand each shall occupy, and thus prevent quarrels for place and other scenes of disorder. 23 Am. & Eng. Ency. of Law, 126, and cases cited in note 3. See, also, *Cole v. Rowen*, 88 Mich. 219, 13 L. R. A. 848. The arrangement offered by the railroad company gave appellees access to the depot grounds, and the privilege to receive and discharge passengers and baggage, and to stand their bus at the platform while waiting for the arrival and departure of trains. It may be that the position offered to appellees was not as favorable as the part left for appellants, for the reason that passengers alighting from the trains would pass the buses of appellants in going to appellees' bus, as all the buses would be backed against the same platform and stand side by side.

Be this as it may, the railroad company having the power to designate the place each should occupy, neither can complain that the best or most convenient location with reference to the depot or platform was

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Yellow Hammer Gas and Oil Company v. Carlin *et al.*

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given to the other. It is clear, therefore, that the finding and judgment should have been for appellants.

It follows that the court erred in overruling appellants' motion for a new trial. The error, if any, in sustaining appellees' demurrer to the first and second paragraphs of answer, was harmless, for the reason that the same evidence could be and was given under the third paragraph of answer.

Judgment reversed, with instructions to sustain appellants' motion for a new trial, and for further proceedings in accordance with this opinion.

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YELLOW HAMMER GAS AND OIL COMPANY v.  
CARLIN ET AL.

[No. 17,995. Filed May 25, 1897.]

148 68  
149 709  
150 48  
150 694

**APPEAL AND ERROR.**—*Longhand Manuscript.*—*How Made Part of Record.*—It must affirmatively appear from the record that the long-hand manuscript of the evidence was filed in the clerk's office before being filed as a part of the bill of exceptions.

From the Wells Circuit Court. *Affirmed.*

*Joseph S. Dailey, Abram Simmons and Frank C. Dailey*, for appellant.

*J. J. M. La Follette, O. H. Adair and G. A. Mason*, for appellees.

HACKNEY, J.—This was an action in ejectment and to quiet title. The only assignment of error is in the action of the lower court in overruling the appellant's motion for a new trial, and the only question discussed by the appellant depends upon the evidence. The appellees insist that the evidence is not properly in the record, and that, therefore, the question so discussed is not before us.

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Yellow Hammer Gas and Oil Company v. Carlin *et al.*

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The transcript contains what purports to be the original longhand manuscript of the evidence. An order book entry discloses the filing on February 10, 1896, of the longhand manuscript and the bill of exceptions, without disclosing that the manuscript was filed before or apart from its filing in the bill. The clerk, in his general certificate, certifies to the filing of the manuscript on the 10th day of February, 1896. From the bill of exceptions it appears that it was tendered to and signed by the trial judge on the 8th day of February, 1896, and within the bill of exceptions the clerk certifies specially that the longhand manuscript was filed in his office on the 8th day of February, 1896. Looking to the 8th of February as the date of filing, it does not appear that the longhand manuscript was filed before it was embodied in and filed as a part of the bill. Regarding the 10th of February as the date of its filing, it is seen that it was not filed when the bill of exceptions was tendered to and signed by the judge on the 8th of February.

The requirement that the record shall affirmatively disclose the filing of the longhand manuscript prior to its filing as a part of the bill of exceptions is firmly settled. Section 1476, Burns' R. S. 1894; *DeHart v. Board, etc.*, 143 Ind. 363; *Chicago, etc., R. W. Co. v. Eggers*, 147 Ind. 299; *City of Decatur v. Grand Rapids, etc., R. R. Co.*, 146 Ind. 577; *Mason v. Brody*, 135 Ind. 582.

No available error appearing in the record, the judgment is affirmed.

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Ellis v. The City of Indianapolis et al.

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ELLIS v. THE CITY OF INDIANAPOLIS ET AL.

148 70  
4167 498

148 70  
150 808

[No. 17,928. Filed May 25, 1897.]

**PLEADING.—Amendment.—Practice.**—Where a demurrer is sustained to an original complaint and no appeal is taken from such ruling, such pleading, whether called a complaint or an amended complaint, is out of the record. *p. 72.*

**SAME.—Amended Complaint.—Practice.**—Where a complaint to which a demurrer has been sustained is refiled without any changes being made therein, the ruling on the demurrer to the original complaint applies equally to the unchanged "amended complaint," and it is also wholly out of the record. *pp. 72, 73.*

**SAME.—Supplemental Complaint.—Practice.**—Where, at the time of filing a supplemental complaint, the original and amended complaints were out on demurrer, such supplemental complaint has nothing to stand upon, and cannot of itself be made the foundation of an action. *p. 73.*

From the Marion Circuit Court. *Affirmed.*

*W. V. Rooker and W. D. Bynum, for appellant.*

*A. G. Smith and C. A. Korbly, for appellees.*

HOWARD, J.—On September 11, 1895, the appellant, "for and on behalf of himself and all other citizens of Washington township, in Marion county, in the State of Indiana, said citizens being too numerous to join as plaintiffs herein," filed his complaint to enjoin the appellees, being the city of Indianapolis, its board of public safety and the Indiana State Board of Agriculture, from appointing peace officers for the State fair grounds, situated in said Washington township and adjoining the said city of Indianapolis.

A temporary restraining order seems to have been issued by the court on the filing of the complaint. On September 12, 1895, the appellees filed their motion to



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dissolve the restraining order; which motion, on September 14, 1895, was sustained, and the restraining order was dissolved and set aside.

On September 28, 1895, the several appellees filed their separate demurrers to the complaint; which demurrers, on October 14, 1895, were sustained by the court.

On November 19, 1895, the appellant filed what is called "his amended complaint," but which is the original complaint refiled. On the same day he filed a supplemental complaint. In the supplemental complaint it is alleged, that since the filing of the original complaint the Indiana State Board of Agriculture had given an exhibition under the name of the "Indiana State Fair," on the said State fair grounds; that numerous persons, including children, youths and women, had attended the fair; that unlawful and immoral exhibitions were permitted upon said grounds; that the police officers appointed by appellees failed to prevent or repress such unlawful exhibitions; that the said state board threatened to repeat said State fair in September, 1896, and to permit the repeating of said unlawful and degrading exhibitions, and again to send police officers to said grounds in said township, unless enjoined from so doing.

On January 6, 1896, the appellees demurred to the supplemental complaint, and on January 7, 1896, this demurrer was sustained.

On March 10, 1896, the appellee, State Board of Agriculture, moved the court "to render final judgment for the defendants herein on the demurrer to the supplemental complaint;" and under date of March 12, 1896, the following final entry is shown in the record:

"Come again the parties by counsel, and the court having heretofore sustained the demurrer of the defendants to the amended and supplemental complaint

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Ellis v. The City of Indianapolis et al.

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herein, the plaintiff elects to stand by the said complaint and declines to plead further. It is, therefore, considered and adjudged by the court, that the plaintiff take nothing by his action," etc.

The recital in this final entry, to the effect that the court had theretofore sustained the appellees' demurrer to "the amended and supplemental complaint," is quite unsatisfactory. A reference to the record as originally filed, and also as completed by *certiorari*, fails to show any demurrer to an amended complaint. Demurrers to the original complaint were sustained on October 14, 1895, and a demurrer to the supplemental complaint was sustained on January 7, 1896. No other demurrers are shown in the record. The recital as to a demurrer to the amended complaint must therefore be an error of the clerk in making up the final entry.

The record is irregular in other respects. What is called the "amended complaint," filed November 19, 1895, is not an amended complaint. It is the original complaint refiled, word for word. The paper so filed forms no part of the record, as apart and distinct from the original complaint. The court had sustained a demurrer to the original complaint, and as no appeal was taken from that ruling, the original pleading, whether called a complaint or an amended complaint, is out of the record for every purpose. The ruling on the demurrers to the original complaint applies equally to the unchanged "amended complaint," and it is also wholly out of the record.

Even if the amended complaint were but slightly or informally changed from the original, so as not to introduce a new cause of action or to change the issues, it would not have been error to refuse to allow a demurrer to be filed to such new pleading.

In 6 Ency. Pl. and Prac. 381, citing *Board, etc., v.*

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*O'Connor*, 137 Ind. 622, and *Stanton v. Kenrick*, 135 Ind. 382, it is said: "When an amendment is merely formal and does not introduce a new cause of action, so as to render a disturbance of the issues necessary, it has been held that it is not error to refuse to permit a demurrer to be filed to the amended pleading. So, also, when a complaint is amended after demurrer filed, but the amendment does not change the issues, the court may refuse to allow another demurrer to be filed." Still more in the case before us, where the "amended complaint" was identical with the original, no demurrer would have been heard to the re-filed pleading; it was out under the ruling sustaining the original demurrer.

It therefore appears that at the time of the filing of the "supplemental" complaint, there was no complaint on file to which it could be supplemental. Indeed, the pleader himself, in writing his supplemental complaint, does not seem to have recognized the "amended" complaint as distinct from the original. The so-called amended complaint is nowhere referred to, but the pleading is strictly, and by express reference, made supplementary to the original complaint. But the original complaint was out on demurrer, and, as said in *Stanton v. Kenrick*, *supra*, "if the demurrer to the original complaint was good, it was good also to the amended complaint." The supplemental complaint had nothing to stand upon, and could not of itself be the foundation of an action.

It may be questioned, however, whether the defective pleading was properly attacked by demurrer. It is said in 6 Ency. Pl. and Prac. 382, that "a demurrer cannot be filed to original and supplemental complaints separately, but should go to both as a whole, as a supplemental pleading is merely an addition to the original." See also *Peters v. Banta*, 120 Ind. 416.

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*Long et al. v. Ruch et al.*

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The proper action would perhaps have been a motion to strike out the supplemental, and also the "amended" complaint, and for judgment on the demurrers to the original complaint. The end reached by the court, however, was the same as if this had been done, and we do not think there was any available error. *Denton v. Thompson*, 136 Ind. 446, at p. 455; *Blue v. Capital Nat'l Bank*, 145 Ind. 518, and authorities there cited.

No question therefore being presented as to any ruling of the court, the judgment is affirmed.

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LONG ET AL. v. RUCH ET AL.

[No. 18,023. Filed May 25, 1897.]

148	74
180	452
148	74
154	241
148	74
158	90

**PRACTICE.**—*Motion to Strike Out Another Motion.*—A motion to strike out another motion is not a proper motion, but if entertained and sustained by the court, it is equivalent to overruling the first motion. p. 77.

**JURISDICTION.**—*Circuit Court.*—*Presumption.*—A circuit court being a court of general jurisdiction, the presumption is, where a judgment has been rendered, that the court had jurisdiction, especially as to the parties, until the contrary is made to appear. p. 78.

**JUDGMENT.**—*Collateral Attack.*—*Drainage.*—Where a motion is made in a drainage proceeding to set aside a judgment entered on the report of the commissioners assessing benefits, on the ground that no notice was given the moving parties, such motion is a collateral attack on the judgment, and must set forth that the record discloses such want of notice. p. 78.

**SAME.**—*Motion to Set Aside.*—*Court Not Legally in Session.*—The statement in a motion to set aside a judgment, that the court was not legally in session when the judgment was rendered, is a statement of a conclusion of law, and therefore unavailing. p. 79.

From the Whitley Circuit Court. *Affirmed.*

*W. E. Colerick* and *W. G. Colerick*, for appellants.

*T. R. Marshall*, *W. F. McNaghy* and *P. H. Clugston*, for appellees.

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*Long et al. v. Ruch et al.*

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MCCABE, C. J.—In a certain drainage proceeding entitled “Petition of Joseph Ruch *et al.* for drainage,” appellants entered a special appearance for the purposes of, and filed a motion to set aside and vacate two certain judgments entered against them in said matter. Thereupon the petitioners for said drainage entered a special appearance to said motion and moved to strike said motion and application from the files, which motion the court sustained, and the motion and application was stricken from the files. Said motion and application to set aside said judgment was entitled thus:

“State of Indiana,)      In the matter of the petition
Whitley County.      of Joseph H. Ruch et al.
for drainage.

In the Whitley Circuit Court. April Term, 1896.”  
And the substance of the motion was then as follows:

Come now the undersigned, specially appearing at this time to the above entitled proceeding for the sole purpose of making this motion and application, and represent to the court that the report of the drainage commissioners to whom the petition in said proceeding for the location and construction of the drain therein mentioned was referred, and which report was presented to, and filed in this court on February 22, 1894, certain parcels of real estate then and now owned by these applicants severally, were assessed by said commissioners in certain amounts for supposed benefits that said lands would, in the opinion of said commissioners, receive by reason of the construction of said drain, which several parcels of real estate so assessed are described in said report. That on the filing of said report in this court, it fixed April 7, 1894, for hearing said report. That these applicants filed no remonstrance to said report, but others whose lands

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*Long et al. v. Ruch et al.*

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were assessed did remonstrate, and that during the hearing of such report and remonstrances at the October adjourned term of said court for 1895, an agreement was made by the petitioners and remonstrants, that certain assessments that had been made by said commissioners, as shown by said report against Lake and Eel River townships, in Allen county, were to be released and discharged, and the assessments against the lands of all of said remonstrants were to be reduced fifty per cent., and that no assessments should be made against any of said remonstrants' lands in the future for repairs or cleaning said drain, and that said remonstrants should recover their costs; and the further hearing of said report and remonstrances was suspended and abandoned by this court. And the court on said day, in accordance with the terms of said agreement, rendered a finding and judgment in said proceeding by which said townships were relieved and discharged from payment of said assessments against them, and reducing the said assessments against the lands of the remonstrants fifty per cent., which judgment was duly entered in the order book of said court. That none of these applicants were parties to said agreement, "and never in any manner consented, \* \* \* to the rendition of said judgment, and the same was rendered without their knowledge and consent, and in their absence, and without any notice to them. That said judgment, as to them, is inequitable and unjust" for a number of reasons stated.

And they further represent that this court, as a part of said judgments, established said drain, and ordered the construction of the same as prayed for in the petition in said proceeding; that said court at the time said judgment was rendered was not legally in session, and had no power or authority to hold at that time said special term of said court.

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Long *et al.* v. Ruch *et al.*

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It is then stated that on December 21, 1895, said judgment was attempted to be set aside under an agreement, and by which another judgment was to be, and was rendered after such attempted setting aside of said first judgment had been done. The second judgment was rendered in all respects like the first, with the exception of some modifications which are stated in the motion, and not material here to be stated. And then the motion states: "that said last judgment was and is a nullity, as this court had no power or authority to vacate said first judgment without notice to these applicants, \* \* \* and that no notice of any kind whatever was given to these applicants and to said other persons to vacate said first judgment and render said subsequent judgment, and that the same was done in their absence and without their knowledge and consent, and that the judgment is unfair, inequitable, unjust, and invalid." This motion was signed by all the appellants.

The motion to strike out or from the files the motion to set aside the judgments was not a proper motion, and ought not to have been entertained by the court. But the court having entertained and sustained it was tantamount to overruling the motion to set aside the judgments. *Blemel v. Shattuck*, 133 Ind. 498, and authorities there cited; *Lang v. Superior Court*, 71 Cal. 491, 12 Pac. 306.

The only error assigned is the action of the trial court in sustaining the motion to strike out appellants' motion to set aside the judgments. And as that action is the equivalent of overruling the motion to set aside the judgments, the only question presented is, did the circuit court err in refusing to set aside the judgments? The ground on which the motion attacks the judgments is that they were rendered without notice to, and in the absence of the appellants, and,

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*Long et al. v. Ruch et al.*

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hence, without the circuit court having acquired jurisdiction over the person of the appellants.

The circuit court being one of general jurisdiction, the presumption is that it had jurisdiction, especially as to the parties, until the contrary is made to appear. *Exchange Bank v. Ault*, 102 Ind. 322; *Cassady v. Miller*, 106 Ind. 69; *Bateman v. Miller*, 118 Ind. 345; *Nichols v. State*, 127 Ind. 406.

But here it is stated that appellants were parties, and that the said judgments affecting them were rendered without any notice to them, without any knowledge that the judgments were being rendered, and that they were rendered in their absence.

This is a collateral attack upon the judgments, and if the record of them shows that the court had acquired jurisdiction over the appellants, and the court having jurisdiction over the subject, they cannot have them set aside in this collateral way. *Harman v. Moore*, 112 Ind. 221, and authorities cited. Hence, when such an attack is made it is incumbent on the attacking party to show in his complaint or motion what the record of the judgment attacked discloses as to notice to, or appearance of the defendant, or the acquisition of jurisdiction by the court over his person; for if that record should disclose that he appeared, or was duly served with process and defaulted, his averments to the contrary would amount to nothing, and could not overcome the statements in the record. *Bailey v. Rinker*, 146 Ind. 129, and cases there cited; *Exchange Bank v. Ault*, *supra*.

The motion here does not set forth any part of the record of said judgments sought to be set aside, nor is the record of either of said judgments set forth in the transcript in this appeal, so that we are left without any statement or information as to what the record of



*Earhart et al. v. The Farmers' Creamery et al.*

said judgments disclosed on the subject of jurisdiction over the person of the appellants.

For failure to set forth in the motion what the record of such judgments disclosed as to the acquisition of jurisdiction by the circuit court over the person of the appellants, and the record thereof not being before us, the motion to set aside such judgments was properly overruled, which the circuit court in effect did when it sustained the motion to strike from the files the motion to set aside the judgments.

The statement in the motion that the court was not legally in session when the judgments were rendered, and had no power or authority to hold at that time said special term, is a statement of a conclusion of law founded on facts not stated, and, therefore, amounted to nothing.

Judgment affirmed.

## EARHART ET AL. v. THE FARMERS' CREAMERY ET AL.

[No. 18,075. Filed May 25, 1897.]

**PLEADING.—Practice.—Waiver of Ruling on Demurrer.**—If a defendant answers before his demurrer to the complaint is disposed of he waives a ruling on the demurrer. *p. 80.*

**APPEAL AND ERROR.—Joint Assignment.**—A ruling which is not available as to all the parties against whom it is made cannot be successfully assigned jointly by them. *p. 80.*

**DRAINAGE.—Remonstrance.—Evidence.**—Where the aggregate benefits of a proposed drain, which benefits were unquestioned by anyone against whom they were assessed, exceeded the cost of the drain, evidence that collectively the lands affected were of no more value with than without the proposed drainage is inadmissible to sustain a remonstrance under the eighth cause specified in section 5625, Burns' R. S. 1894. *pp. 81, 82.*

**SAME.—Report of Commissioners.—New Trial.**—Objection to the report of drainage commissioners, because they did not properly describe the lands affected by a certain drain, must be remedied by motion addressed to the report, and cannot be reached by motion for new trial. *pp. 82, 83.*

148	79
151	181
152	283
152	541
148	76
155	174
155	311
155	570
155	677
148	79
168	587

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From the Clinton Circuit Court. *Affirmed.*

*Claybaugh & Claybaugh, J. C. Farber and W. H. Peters*, for appellants.

*M. A. Morrison, O. E. Brumbaugh and Joseph Combs*, for appellees.

HACKNEY, J.—This was a proceeding in the lower court for the drainage of lands. The appellants jointly demurred to the petition of the appellees. Before any ruling was made upon the demurrer, a number of the appellants filed remonstrances. Thereafter, and when the court had overruled said demurrer, others of the appellants filed remonstrances, and a trial resulted in findings and decree adverse to said appellants, and they jointly assign as errors the action of the lower court in so overruling their demurrer, and also in overruling their joint motion for a new trial.

The demurrer was for the want of sufficient facts. Those who filed remonstrances, pleading to the merits of the petition, before the ruling upon said demurrer, waived the demurrer. *Hosier v. Eliason*, 14 Ind. 523; *Gordon v. Culbertson*, 51 Ind. 334; *Robertson v. Huffman*, 92 Ind. 247; *Morrison v. Ross*, 113 Ind. 186; *Board, etc., v. Adams*, 76 Ind. 504; *Ludlow v. Ludlow*, 109 Ind. 199; *Moore v. Glover*, 115 Ind. 367; 1 Works Pract. 539. Several of the cases cited are exactly to the point that the ruling upon a demurrer thus waived presents no question.

A ruling not available as to all against whom it is made cannot be successfully assigned jointly by them. *Armstrong v. Dunn*, 143 Ind. 433; *Goss v. Wallace*, 140 Ind. 541; *Medical College v. Commingore*, 140 Ind. 296; *Bower v. Bowen*, 139 Ind. 31; *Carr v. Carr*, 137 Ind. 232; *King v. Easton*, 135 Ind. 353; *Douthit v. Douthit*, 123 Ind. 26.

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*Earhart et al. v. The Farmers' Creamery et al.*

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The ruling upon demurrer to the petition not being available as to some of the appellants, the assignment presents no question thereon.

The rejection of certain evidence offered by the appellants tending to prove that the lands affected collectively by the proposed drainage, and some of the lands severally, were of no more value with than without the proposed drainage is now complained of as having been erroneous, under the eighth cause of remonstrance specified in section 5625 Burns' R. S. 1894, and pleaded by the appellants severally: "That it will not be practicable to accomplish the proposed drainage without an expense exceeding the aggregate benefits." For the appellants, it is urged, that to hold the evidence inadmissible is to deny that the quoted words constitute a cause of remonstrance, and would practically repeal the statute. For the appellees, it is insisted that this statute permits an inquiry by the several remonstrants as to the cost of the improvement, but not as to the benefits in the aggregate, where, as in this case, more benefits are unquestioned, as to the remonstrants severally, than the conceded cost of the improvement. Here the aggregate benefits reported were \$1,900.00, and the reported cost of the improvement was \$1,700.00. Of these reported benefits, but the sum of \$25.00 was questioned by any one against whom the same were assessed, thus leaving \$1,875.00 of the reported benefits conceded. These assessments might have been questioned under other statutory causes of remonstrance by the parties severally; but, excepting as to said sum of \$25.00, no such question was made, nor was there evidence, or offer of evidence that said sum of \$1,700.00 was not the proper cost of the improvement.

It will thus be seen that to have heard the rejected

evidence would have permitted a landowner, interested in but one of many tracts, to test the correctness of assessments against numerous tracts whose owners made no such question, but conceded and became irrevocably bound by the assessments made against them. If the trial court had received the offered evidence without contradiction, and had undertaken to act upon it, the anomalous decree must have been entered that, from the benefits conceded, there were \$1,875.00 collectible from the lands assessed and benefited, and, from the evidence so received, there were no benefits to the lands so assessed; that under one provision of the statute the improvement should be made, and under another provision the proceeding should be dismissed.

It would seem unnecessary to suggest that the legislature never intended any such contradictory possibilities in the procedure under the statute in question. Two methods of determining the benefits to lands are provided by the statute; one by the commissioners, and the other by the court, upon remonstrances by those whose assessed benefits are questioned. When, by either of these methods, the benefits aggregated are less than the cost of the proposed drainage, the eighth cause of remonstrance is made out. In the question of the cost of the drain, each landowner has an interest, and may, under the eighth cause for remonstrance, offer proper evidence upon that subject. The evidence offered in this instance did not go to the cost of construction, but its one tendency was to contradict conceded benefits to the lands. In our opinion, the court did not err in rejecting it.

One cause assigned for a new trial was that the report of the commissioners did not describe the lands affected as in Clinton county. This was not a part of the trial, but was a question to be reached and rem-

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*Carmien et al. v. Cornell et al.*

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edied by motion addressed to the report, and not by a new trial.

Complaint is also made that the finding of the court failed to declare the drain of public utility. This complaint has been obviated by an amendment to the record.

At the close of the evidence for the petitioners the remonstrants, appellants, moved the court to dismiss the proceeding because of a supposed failure of proof that the proposed drain would improve the public health, benefit a highway, or be of public utility. Not only was the motion not well founded in fact, but we are impressed that the ruling thereon is not properly presented to this court by an assignment of the trial court's action in overruling the motion for a new trial.

The only other questions discussed depend upon the weight and construction of the evidence, and are not considered.

The judgment is affirmed.

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CARMEN ET AL. v. CORNELL ET AL.

[No. 18,119. Filed May 25, 1897.]

**PLEADING.—Complaint.—Mutual Life Insurance.**—A complaint by policy holders in a mutual life insurance company to enjoin the company from making an assessment upon its members to pay certain specified policies claimed to be invalid, alleging that the plaintiffs are policy holders in defendant company, is sufficient to show that the plaintiffs were members of the company, without setting forth all the steps taken by the appellees to become members, or stating the amount of fees or assessments paid by them. *pp. 85, 86.*

**INJUNCTION.—By Member of Mutual Life Insurance Company to Prevent Payment of Invalid Claim.**—A policy holder in a mutual life insurance association may maintain a suit to enjoin the association from paying an invalid claim, where it is shown that the association has accumulated, and is accumulating from the assessments collected

148	83
150	307
148	83
150	290
150	509

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from its members, a fund for the benefit of all policy holders, from which policies are paid at the death of the holders, and from which dividends are distributed to the policy holders, and added to their policies. *pp. 85, 86.*

**INJUNCTION.**—*To Prevent Officers of Mutual Insurance Company from Paying Invalid Claim.*—Where the officers of a mutual insurance company have accepted the proof of loss of a claim made by the beneficiary of an invalid policy, and are about to lay assessments upon the members for the purpose of paying said invalid claim, the members of the company have no adequate remedy at law, and are entitled to injunctive relief. *pp. 87, 88.*

**MUTUAL LIFE INSURANCE.**—*Joint Action by Policy Holders.*—The holders of separate and independent policies in a mutual life insurance company may join as plaintiffs in a suit to enforce a common interest. *p. 89.*

**PLEADING.**—*Abatement Not Pleaded with Answer in Bar.*—An answer in abatement cannot be pleaded with an answer in bar, but must precede it, and the issue must be tried first and separately. *p. 89.*

From the Elkhart Circuit Court. *Affirmed.*

*J. S. Dodge and O. Z. Hubbell, for appellants.*

*F. E. Baker and C. W. Miller, for appellees.*

**MONKS, J.**—Appellants brought this action as policy holders in a mutual life insurance company, organized under the laws of this State, to enjoin said company from making an assessment upon its members, including appellees, and paying to appellants the amount of two policies upon the life of one Mitchell, said appellants having no insurable interest in his life, and said policy having been issued without his knowledge or consent. Section 4902, Burns' R. S. 1894 (Acts 1883, p. 203, section 4). A demurer to the amended complaint for want of facts was overruled. Answers in two paragraphs were filed, the first paragraph being a general denial and the second a plea in abatement. Appellees' demurrer to the plea in abatement was sustained. A trial of the cause by the court resulted in a finding and judgment in favor of appellees.

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The errors assigned and not waived call in question the action of the court in overruling the demurrer to the complaint, and in sustaining the demurrer to the plea in abatement. It is urged by appellants, against the sufficiency of the complaint, that the same wholly fails to show any interest of appellees in said insurance company, that the averment that appellees are the holders of certain policies in the said company is but a mere conclusion. The part of the complaint concerning appellees' interest in said company is as follows: "That plaintiff, Jacob B. Cornell, is the holder of policy No. 3611, issued by the defendant company to him on March 1, 1890, insuring said Jacob B. Cornell for the benefit of his estate in the sum of one thousand dollars, which policy is now in full force; and the plaintiff, John W. Cornell, is the holder of policy No. 570c, issued by the defendant company on March 1, 1890, insuring the life of said John W. Cornell in the sum of one thousand dollars, for the benefit of his estate, which policy is now in full force. \* \* \* That Jacob B. Cornell and John W. Cornell are now, and have been since March, 1890, members of said defendant society, contributing to its funds for the purpose of paying the expenses and death losses by assessments made against them by the proper officers of said defendant society." It is further alleged, in substance, that the defendant company has accumulated and is accumulating from the assessments collected by it from its members, a fund for the benefit of all policy holders from which policies are paid at the death of the holders to the beneficiaries who are entitled to the same, and from which earnings dividends are distributed to the policy holders and added to their policies, and that said defendant company is a mutual company, organized under the laws of this State, and its funds belong to its members who have legal

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policies in said company, and that plaintiffs are interested in, and part owners of the funds of said company.

We think these allegations are sufficient to show that appellees were members of said company, and had such interest as entitled them to bring this action. It was not necessary to set forth all the steps taken by appellees to become members of said company, nor to state the amount of the membership fees or assessments paid by them.

Appellants cite *Elsey v. Odd Fellows Mutual Relief Association*, 142 Mass. 224, 7 N. E. 844, to sustain the proposition that a member of an assessment insurance company cannot maintain a suit to enjoin the company from paying a policy to a person who claims to be a beneficiary thereunder. In the case cited the company was organized under a statute which provides that such associations may "for the purpose of assisting the widows, orphans, or other persons dependent upon deceased members, provide in its by-laws for the payment by each member of a fixed sum, to be held by such association until the death of a member occurs, and then to be forthwith paid to the person or persons entitled thereto." In said case one Wetmore, in his application for membership, designated his wife, Addie E. Wetmore, as the person to whom the benefit was to be paid upon his death. Afterwards he attempted to change the designation from his wife to his mother, Abigail Wetmore. The action was brought by one Elsey, a member of said association, and Addie E. Wetmore, the wife, was joined with him as co-plaintiff, to enjoin the payment to Abigail Wetmore, the mother, and the court held that the assignment to the mother was invalid, and the original designation of the wife remained in force. The court also said that the plaintiff, Elsey had no interest in the fund, and



could not maintain the bill. It was conceded that either the wife or the mother was entitled to the money. The controversy, therefore, was between them; and Elsey, as the court held, had no interest in the question, and was not a proper party. Elsey had no interest in the controversy for the further reason that under said statute the person designated by a member receives the money paid in by such member, and has no interest in any other money or funds, and no member has any interest or concern in what is paid in by any other member. The court said concerning this statute: "It authorizes an association of a peculiar character. Its object is to enable a man to lay aside a portion of his income or property, in the nature of an insurance upon his life, to be applied at his death to the use of his widow, orphans, or other persons dependent upon him. But the provisions of the general laws relating to life insurance companies do not apply to this association; the fund held by it is not attachable by creditors of the member, and, by clear implication of the statute, after he has set it aside, he loses the absolute control over it which he has over his other property; he cannot assign it and divert it from the class of beneficiaries described in the statute, and direct its disposition to other persons outside of that class." It is clear that this can give no support to appellants' contention.

It is next insisted by appellants "that the statement in the complaint that 'the said society is about to lay assessments upon its members, including plaintiffs, for the purpose of paying said claim, and will do so unless restrained by this court,' is not sufficient to call for interposition of the strong arm of equity." The following allegations in the complaint are also to be considered in determining this question. "The company has accepted the proofs of loss and claim made

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by the holder of said policy as being valid against said company, when in truth and in fact said policy is a fraudulent claim, and never at any time had a legal existence by reason of fraud in procuring the same to be written, as heretofore set forth; that the defendant society, by its managing officers who are in possession of its funds and entrusted with the management of its affairs, is about to pay from the funds of said society the amount of said policy to the defendant policy holder, although said managing officers well know that said policy is fraudulent, and was never legally issued, and is not and never has been a valid claim against said society; that the said managing officers of said society and the said defendant policy holders have agreed that said claim is a valid claim and that the same shall be paid by said managing officers without defense; that the said managing officers of the said society, for the purpose of assisting the defendant policy holder in obtaining the money of said society upon said fraudulent claim, have refused these plaintiffs to decline said claim and to contest the same, although requested by the plaintiffs so to do, and the said managing officers will not now, or at any future time, as plaintiffs charge and believe, make any defense whatever against said claim; that if the defendant policy holder herein should institute an action of law against said society for the purpose of recovering upon said policy, the said managing officers of said society, in violation of their duties to these plaintiffs, would permit a judgment to be taken against said society by default, or without making the defense against said policy which equitably exists." These allegations show that appellees had no adequate remedy at law and were entitled to injunctive relief. Section 1162, Burns' R. S. 1894 (1148, R. S. 1881); *Champ v. Kendrick*, 130 Ind. 549.

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In *Champ v. Kendrick*, *supra*, this court said, the "remedy which prevents a threatened wrong is in its essential nature better than a remedy which permits the wrong to be done, and then attempts to pay for it by the pecuniary damages which a jury may assess."

Appellees each had separate and independent policies in said insurance company, but the object of the suit was to enforce a common interest, and they therefore had the right to join as plaintiffs in bringing this action. *First Nat'l Bank v. Sarlls*, 129 Ind. 201; *Town of Sullivan v. Phillips*, 110 Ind. 320; *Tate v. Ohio, etc., R. R. Co.*, 10 Ind. 174, and cases cited; *Kipper v. Glancey*, 2 Blackf. 356; *Ruffing v. Tilton*, 12 Ind. 259; *Strong v. Taylor School Tp.*, 79 Ind. 208; *Field v. Holzman*, 93 Ind. 205; Thorton's Ind. Prac. Code, p. 24, notes 9, 12, 14, 15.

Under our code of procedure an answer in abatement cannot be pleaded with an answer in bar, but must precede it, and the issue must be tried first and separately. Section 368, Burns' R. S. 1894 (365, R. S. 1881); *Field v. Malone*, 102 Ind. 251; *Glidden v. Henry*, 104 Ind. 278; *Brink v. Reid*, 122 Ind. 257; *Watts v. Sweeney*, 127 Ind. 116.

The answer in abatement was filed with the general denial, an answer in bar, and was subject to be stricken out on motion, the error therefore, if any, in sustaining a demurrer thereto was harmless. *Watts v. Sweeney*, *supra*.

Finding no available error in the record the judgment is affirmed.

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 Everett et al. v. Deal et al.
 

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## EVERETT ET AL. v. DEAL ET AL.

[No. 18,163. Filed May 25, 1897.]

148	90
161	287

148	90
170	426

**INJUNCTION.**—*Street Improvements.*—An action will not lie to enjoin the trustees of a town from making street improvements after the contract therefor has been entered into, where such trustees had jurisdiction to enter into the contract, as the statute under which such street improvements are made provides that in case a property owner refuses to pay his assessment, an appeal may be had in which all questions from the making of the contract to the report of the engineer on the final assessment are brought in review.

**RECORDS.**—*Correction of, by nunc pro tunc Entry.*—It is competent for any tribunal to correct its record so as to make it speak the truth.

From the Scott Circuit Court. *Affirmed.*

*O. H. Montgomery*, for appellants.

*Joseph H. Shea, Samuel B. Wells and Eugene Haugh*, for appellees.

**HOWARD, J.**—This was an action brought by the appellants as property owners upon certain streets of the town of Scottsborough, against the appellees, being the said town, and Charles T. Deal, contractor, to enjoin the making of certain street improvements upon the said streets. The court at first granted a temporary restraining order against appellees, but on the trial of the cause found in their favor, dissolved the restraining order, and rendered judgment for appellees. The only error assigned is that the court overruled the motion for a new trial.

The contract was let April 13, 1896; and this action to enjoin the work was not brought until June 8, 1896, and after the work was begun. It was said in *Alley v. City of Lebanon*, 146 Ind. 125, citing *Robinson*

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v. *City of Valparaiso*, 136 Ind. 616, also sections 4288-4299, Burns' R. S. 1894 (Acts 1889, p. 237; Acts 1891, p. 323), that an injunction might, in proper case, be had "upon the proceedings prior to the making of any such [street or sewer] improvements;" but that "from the time that work begins under a lawful contract, vested rights attach; and the faithful completion of the work is placed by the law in custody of the city authorities, chosen by the people and clothed with power to care for the common welfare." Also, that, under the same statute, "if a property owner refuses to pay his assessment, and a precept is issued for its collection, an appeal may be had; on which appeal 'all questions from the making of the contract to the report of the engineer on the final assessment are brought in review.'" It might therefore be said in this case, as was said in the case of *Alley v. City of Lebanon*, *supra*, that the appellants, not having brought their injunction proceedings before the making of the contract for the street improvements, and there being provided a right of appeal in case a precept should be issued for the collection of the assessments to be made against them, this action cannot lie. And this would be true here, as it was there, unless it should be shown by the record that the board of town trustees was absolutely without jurisdiction to enter into the contract for the improvement of the streets.

We have, however, carefully considered all the reasons advanced by the learned counsel for appellants to show that the board had not acquired jurisdiction to enter into the contract, and we find them without force. All the steps required by the statute to be taken, including the giving of notice to the persons concerned, were substantially complied with. We have also considered the questions raised as to the introduction of evidence, and find them unavailing. The

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town maps, and evidence as to names of streets and their dedication to the public, were all proper for the information of the court. So of the *nunc pro tunc* entry in the minutes of the town board. It is competent for any tribunal to correct its record so as to make it speak the truth. *City of Logansport v. Crockett*, 64 Ind. 319, and authorities cited. It is not necessary to consider in detail all the objections raised by counsel to the rulings and action of the court. It is enough to say that we have carefully considered them, and do not find anything to show that the board did not have jurisdiction to enter into the contract under consideration.

Judgment affirmed.

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ADAMS ET AL. v. VANDERBECK ET AL.

148	92
152	258

[No. 17,740, Filed Dec. 28, 1896. Rehearing denied May 25, 1897.]

148	92
156	230

**INSTRUCTIONS.—Practice.—Statute Construed.**—Section 662, Burns' R. S. 1894 (650, R. S. 1881), dispensing with the necessity of bringing up the evidence on appeal upon the question of the correctness of instructions, makes no change in the practice as to instructions given, as the court, in the absence of the evidence, presumes that the instructions were applicable. *p. 94.*

**SAME.—Mortgage Given to Secure a Precedent Debt.**—An instruction in an action to quiet title to real estate that a mortgage taken to secure a precedent debt does not constitute the holder thereof a *bona fide* purchaser, states the law correctly. *pp. 94, 95.*

**DEEDS.—Consideration.—Pre-existing Debt.**—A conveyance of land by a debtor, in payment and satisfaction of a precedent debt, makes the grantee a *bona fide* purchaser of the land as against prior equities acquired from the grantor, of which the grantee had no notice. *pp. 95, 96.*

**VENDOR AND PURCHASER.—Consideration.—Pre-existing Debt.**—Where land is conveyed by the owner to another in payment and satisfaction of a debt due from the grantor to the grantee, who is ignorant of an equity in the land in favor of a third person, the enforcement of such equity against the land will not revive the indebtedness for the payment and satisfaction of which the land

148	92
157	680

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was conveyed, and the grantee is as much a *bona fide* purchaser for value as if he had paid cash. *p. 99.*

APPEAL AND ERROR.—*Instructions.—Presumptions.*—The presumption that the instructions given were applicable to the evidence will prevail on appeal where there is a direct statement in the bill of exceptions that the instructions were applicable to the evidence, notwithstanding certain testimony set out in the bill tended to contradict such statement, as such testimony only nullified the certificate, and, both being eliminated, the usual presumption that the instructions given were applicable to the evidence would prevail. *pp. 99-101.*

From the Henry Circuit Court. *Reversed.*

Clay C. Hunt and M. E. Forkner, for appellants.

Brown & Brown and D. W. Chambers, for appellees.

MCCABE, J.—The appellees sued the appellants to quiet title in and to certain real estate particularly described, situate in Henry county, which appellees claim to own. The issues made by the defendants' answer of a general denial as to a part of the land, and a disclaimer as to the rest, were tried by a jury resulting in a verdict and judgment in favor of the plaintiffs, the appellees, over defendants' motion for a new trial and *venire de novo*.

The action of the circuit court in overruling the motion for a new trial, and for a *venire de novo* is called in question by the assignment of errors.

Among the reasons assigned therefor in the motion for a new trial, and now urged as cause for reversal, are that the court erred in the giving to the jury certain instructions, and refusing and modifying an instruction. There is in the transcript what purports to be a bill of exceptions purporting to incorporate the evidence into the same, but it is conceded even by the appellants, that it was not filed in time, and forms no part of the record.

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There is another bill of exceptions, numbered one, embracing the instructions about which complaint is made. In this bill it is recited that the instructions were applicable to the evidence in accordance with the statute dispensing with the necessity of bringing up the evidence on appeal prosecuted upon the question of the correctness of instructions. Section 662, Burns' R. S. 1894 (650, R. S. 1881). This statute makes no change in the practice as to instructions given, but does as to those refused, because as to those given, this court, without the aid of the statute, presumes that instructions were applicable in the absence of the evidence. *Drinkout v. Eagle Machine Works*, 90 Ind. 423; *Rozell v. City of Anderson*, 91 Ind. 591; *Shugart v. Miles*, 125 Ind. 445; *Kinney v. Dodge*, 101 Ind. 573.

Therefore we must presume that the instructions given were applicable to the evidence.

So much of the instructions as are complained of read as follows: "But if Reed took a conveyance of the land in controversy before Hume's deed was made in discharge of or as security for a precedent debt, Reed would not be an innocent purchaser and could acquire no title as against Hume, although his deed would precede the deed to Hume;" and again, "but if Reed acquired his title in payment of a precedent debt he would not be a purchaser in good faith, and could not hold as against Hume's title; and if there was a misdescription of the land in the mortgage, and if said misdescription was perpetuated in the deed to Hume from Reeder, and in the deed from Hume to Vanderbecks, the plaintiffs, and if at a subsequent period Hume and Reeder and Reeder's wife joined in a deed made by them to Vanderbecks for the purpose of correcting said misdescription, said misdescription would not affect the plaintiffs' title, unless in the meantime an innocent purchaser had acquired a title to said



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land, pending said misdescription; and a deed made to Reed or any third party in payment of, or as security for a precedent debt, would not give them a standing as an innocent purchaser. In such case if you believe from the evidence that the deed from Thomas B. Reeder to Reed was in payment of or as security for the payment of a precedent debt, you should find for the plaintiff."

So far as these instructions relate to the mortgage, or security, taken to secure a precedent debt, not being sufficient to constitute the taker thereof a *bona fide* purchaser, they are undoubtedly correct, which appellants' counsel do not question. *Busenbarke v. Ramey*, 53 Ind. 499; *Gilchrist v. Gough*, 63 Ind. 576; *Davis v. Newcomb*, 72 Ind. 413; *Hewitt v. Powers*, 84 Ind. 295; *Louthain v. Miller*, 85 Ind. 161; *Wert v. Naylor*, 98 Ind. 431.

But, as applicable to a conveyance in payment of a precedent debt, they present a different question. We are bound to presume that there was evidence to which each one of the features of the instructions mentioned was applicable.

The question presented in *Wert v. Naylor*, *supra*, is there thus stated: "Will a conveyance of land by a debtor to a creditor, in payment and satisfaction of a precedent debt, make the creditor a *bona fide* purchaser of the land, as against prior equities of which he had no notice? \* \* \* In the case at bar the conveyance was not a mere security. It was an absolute conveyance, and it is alleged in the third paragraph of the answer, and in the finding of the court, that such conveyance was taken in full payment and satisfaction of one thousand dollars of the precedent debt, and without notice of the plaintiff's claim. \* \* \* A man who merely takes security for a debt gives up nothing, but if he satisfies the debt itself, he does give

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something, and he gives more than he who merely extends the time for payment of the precedent debt, which has often been held sufficient. \* \* \* Pomeroy in his Eq. Jur., vol. 2, p. 208, says that the weight of authority is in favor of the doctrine that the extinguishment or surrender of a precedent debt, in consideration of the conveyance of land, makes the grantee a *bona fide* purchaser even against prior equities."

To the same effect are numerous cases cited in the opinion from which we have quoted. *Petry v. Ambrosher*, 100 Ind. 510; *Tarkington v. Pervis*, 128 Ind. 182; *Orb v. Coapstick*, 136 Ind. 313, are not in point and not in conflict with the case above cited.

We may presume that there was evidence of a conveyance of land in payment and satisfaction of a pre-existing debt owing by the grantor to the grantee, and by agreement of the parties the debt was satisfied and extinguished by the conveyance, and that the grantee had no notice of any prior equity in the land.

The instructions tell the jury that such a purchaser would not be a *bona fide* purchaser.

It is true, according to the authorities cited, the grantee in such case must have taken the conveyance without any notice of the prior equity. But the instructions tell the jury that, if the conveyance was made in satisfaction and payment of a precedent debt, the grantee would not be a *bona fide* purchaser. Under such instruction, the jury would be bound to find that the grantee was not a *bona fide* purchaser, even though the evidence showed that he had no notice of the prior equity. That is not the law.

It is true, if this feature of the instructions would be correct under any supposable state of the evidence, then we are by the established law of this State required to presume that such state of evidence existed in the absence of the evidence in the record. But we

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are also required, as before remarked, to presume that there was evidence from which the jury might have found that the conveyance mentioned in said instructions was made in payment and satisfaction of a pre-existing debt due from the grantor to the grantee, because, if there was no such evidence that feature of the instructions was not applicable to the evidence. Hence, we must hold that feature of the instructions erroneous, and that the circuit court erred in overruling the motion for a new trial.

The judgment is reversed, with instructions to grant defendants' motion for a new trial.

#### ON PETITION FOR REHEARING.

MCCABE, J.—The first point made for a rehearing is that we erred in the original opinion in following and adhering to the doctrine laid down in *Wert v. Naylor*, 93 Ind. 431.

That case concedes that he who takes a mortgage or conveyance as a security for the payment of a precedent debt is not a *bona fide* purchaser for value, as against the holder of a secret equity in the land, because he parts with nothing. But it holds that where he takes a conveyance of such land in payment and satisfaction of a precedent debt, that he is a *bona fide* purchaser for value, and entitled to hold such land, as against the holder of the equity of which such purchaser has no notice or knowledge.

While counsel for appellees do not deny that the rule thus laid down in that case is in harmony with the weight of authority elsewhere, yet they contend that such rule is in conflict with other decisions by this court, and is unsound and unjust, and opens the door to great fraud, and impliedly insist that it ought to be

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overruled. We have already seen in the original opinion that the case is not in conflict with our other cases.

The fraud to which they claim that the doctrine there laid down opens the door is that the holder of an equity in the land may be deprived of the entire value or purchase price paid for the land, where he has not taken a deed by one who, ignorant of such equity, and who takes the land in payment and satisfaction of an antecedent debt; that is to say, the one who has thus taken a deed, by one who ignorant of such equity, and changed his position, because he has parted with no value, as they contend, and hence not a *bona fide* purchaser. And it is insisted, in effect, that if the holder of the equity is allowed to enforce his equity and hold the land, the purchaser in consideration of the antecedent debt, has lost nothing, because he may then enforce his debt, though he may have surrendered and cancelled the evidences thereof, for the reason that the consideration which he was to receive therefor has failed. But that is a mistake. He may have taken a quitclaim deed, and in any event he receives a conveyance of the legal title to the land. This cannot be said to be of no value whatever. If by warranty deed, he has the warranty of title of his grantor.

It is said in *Hardesty v. Smith*, 3 Ind. 39, that: "When a party gets all the consideration he honestly contracted for, he cannot say he gets no consideration, or that it has failed. If this doctrine be not correct, then it is not true that parties are at liberty to make their own contracts." This language was quoted by Elliott, J., speaking for this court in *Wolford v. Bowers, Admx.*, 85 Ind. at page 296, where it is further said that: "The same principle is declared and enforced in many of our own cases. *Kernodle v. Hunt*, 4 Blackf. 57; *Harvey v. Dakin*, 12 Ind. 481; *Baker v. Roberts*, 14 Ind. 552; *Taylor v. Huff*, 7 Ind. 680;

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*Louden v. Birt*, 4 Ind. 566; *Smock v. Pierson*, 68 Ind. 405, 34 Am. Rep. 269; *Neidefer v. Chastain*, 71 Ind. 363, 36 Am. Rep. 198; *Williamson v. Hitner*, 78 Ind. 233." And we add *Laboyteaux v. Swigart*, 103 Ind. 596; *Price v. Jones*, 105 Ind. 543; *Keller v. Orr*, 106 Ind. 406.

When, therefore, land is conveyed by the owner to another in payment and satisfaction of a debt due from the owner to that other who is ignorant of an equity in the land in favor of a third person, the enforcement of that equity against the land does not revive the indebtedness for the payment and satisfaction of which the land was conveyed. Therefore, a purchaser of land in consideration of the payment and satisfaction of a debt due the grantee is as much a *bona fide* purchaser for value, as if he had paid cash. And if he is not to be protected as such, the rule which appellees' learned counsel invokes and asks us to adopt opens a wider door for wrong and fraud than the rule laid down by this court in *Wert v. Naylor*, *supra*, which he asks us to overrule. We think we ought to adhere to the rule laid down in that case.

The only other point made for a rehearing is that we erred in holding that "we are bound to presume that there was evidence to which each one of the features of the instructions mentioned was applicable." Counsel for appellees contend that the bill of exceptions affirmatively shows that there was no evidence to which the erroneous instructions were applicable, and hence that it was harmless. It, however, rarely happens that instructions that are wholly inapplicable to the case made by the evidence are harmless. In *Blough v. Parry*, 144 Ind. 463, and the numerous cases there cited, such instructions were held harmful.

This appeal being prosecuted on the correctness of

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the instructions given and refused, under section 662, Burns' R. S. 1894 (650, R. S. 1881), the trial court certified that the instructions given and refused were applicable to the evidence without setting out all the evidence in the record.

The instructions on which we reversed, were instructions given, and not those refused. We there held, as had been previously held, that the section of the statute cited made no change in the practice as to instructions given, as the presumption always must be, in the absence of the evidence, that instructions given were applicable to the evidence. But, in addition to that presumption, the trial court has certified in the bill of exceptions incorporating the instructions, "that the instructions given by the court, as above stated, \* \* were each and all applicable to the evidence in said cause."

Appellees' counsel, however, insist that the presumption and certificate of the trial judge that the instructions were applicable to the evidence are overcome by the following evidence and recital contained in the same bill of exceptions not purporting to contain all the evidence, to-wit: "Mr. Reeder testified \* as follows: '\* \* \* you may state what the fact is as to whether Jesse M. Reed purchased those lands of you, or whether it was by reason of liabilities that he had assumed for you? Answer. It was on account of Mr. Reed having indorsed for me and I wanted to make him safe. He was related to my wife. He was a cousin to my wife, and I deeded him the land with the understanding that at some time, if ever I got able to, that I should pay him for all that he had paid for me, and redeem the land.' And this was all the evidence on the subject of the consideration for the land deeded from Reeder to Reed." This is not sufficient to overcome the direct statement in the bill of exceptions that

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the instructions were applicable to the evidence; at all events, one statement is as strong as the other. That is as favorable to the appellees as they have a right to ask. Even if we construe the last statement quoted as directly conflicting with the first, which is as favorable to appellees, if not more so, than they have a right to ask, then we have both statements completely nullified. That being so, the presumption that the instructions given were applicable to the evidence must prevail. But, as before observed, it does not relieve the appellees from the consequences of the erroneous instructions by showing, even if we concede that to be the case, that they were not applicable to the evidence.

We see no way of escaping the consequences of giving the erroneous instructions.

Petition overruled.

PITTSBURGH, CINCINNATI, CHICAGO AND ST. LOUIS RAIL-  
WAY COMPANY v. NOFTSGER.

[No. 18,197. Filed May 25, 1897.]

**HIGHWAYS.—Obstructions.—Damages to Abutting Owner.**—The owner of real estate abutting on a public highway cannot maintain an action for the obstruction of such highway unless some special injury, one not common to all who use the highway, has been sustained, where such abutting owner is not the owner in fee simple of any part of the highway. *p. 104.*

**SAME.—Obstructions.—Damages to Abutting Owner.—Special Damages.**—The obstruction of a public highway by a railroad switch in such manner as to materially interrupt an abutting property owner in his means of access to his property, is a special injury, different in kind from that suffered by the public generally, and entitles such abutting owner to maintain an action for damages for such obstruction, notwithstanding such abutting owner is not the owner in fee of any part of the highway. *pp. 104, 105.*

**EVIDENCE.—Intention of Party.**—When the character of an act depends upon the intent with which it was done, the party may testify as to such intention. *p. 106.*

148	101
149	281
150	551
151	500

148	101
153	647

148	101
154	555
154	556
154	587

148	101
158	282

148	101
161	823

148	101
168	622

148	101
171	556
171	603

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**SAME.—Dedication of Land to Public Use.—Intention of Party.—**

Where the declarations, acts, and conduct of a landowner are such as fairly and naturally lead to the conclusion that he intended to dedicate land to public use, and others have in good faith acted upon such acts and declarations, the fact that the landowner may have entertained a different intention from that manifested by his acts and declarations cannot prevail against the force of his conduct and acts upon which the public or those dealing with him have relied. *pp. 106, 107.*

**INSTRUCTION.—Highways.—Obstructions.—Damages to Abutting**

**Owner.**—In an action against a railroad company by an abutting owner for maintaining a switch in a public highway, an instruction that the jury might "take into consideration the injury to the property, if any, naturally resulting from building the switch, in rendering the same inconvenient of access, if it was so rendered, or in any manner causing the same to be less suitable for use, together with the increased danger from fire emitted from the locomotives, and the decreased rental value of the property, together with all the facts proven which show a natural and necessary decrease in the value of the property," is erroneous where such abutting owner was not the owner in fee simple of any part of the highway. *pp. 107, 109.*

**SAME.—Erroneous Instruction.—How Cured.**—An erroneous instruction cannot be cured by giving an instruction excluding some of the elements included in such erroneous instruction, but must be withdrawn from the jury. *p. 109.*

**SAME.—Inconsistent Instruction.**—Where two or more instructions are inconsistent and calculated to mislead the jury, or leave them in doubt as to the law, it is cause for reversal. *p. 109.*

**APPEAL AND ERROR.—Bill of Exceptions.—Evidence.—When Not All in Record.**—Where the bill of exceptions purporting to contain all of the evidence shows upon its face that it does not, this court will not consider the sufficiency of the evidence to sustain the verdict of the jury or the finding of the court. *pp. 109, 110.*

**HIGHWAYS.—Obstructions.—Damages to Abutting Owner.**—The damages recoverable by an abutting landowner against a railroad company for maintaining a switch in a highway must be confined to the land described in the complaint and cannot include damages to another tract of land belonging to plaintiff in close proximity to the land described. *p. 110.*

From the Madison Circuit Court. *Reversed.*

*G. M. Ballard, C. M. Greenlee, J. A. Van Osdol and John L. Rupe, for appellant.*



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*J. W. Perkins, Perry Behymer and W. H. Jones,*  
for appellee.

MONKS, J.—Appellee brought this action to recover damages for the construction of a switch by appellant from its main track over a strip of ground adjoining appellee's premises, upon the theory that the same was a public highway. Appellant's demurrer to the complaint for want of facts was overruled. The cause was tried by a jury and a special verdict returned, upon which, over appellant's motion for a judgment in its favor, and a motion for a new trial, judgment was rendered in favor of appellee.

The errors assigned and not waived, call in question the action of the court, in overruling the demurrer to the complaint, the motion for a judgment upon the verdict in favor of appellant, the motion for a new trial, and in sustaining appellee's motion for a judgment in her favor.

It appears from the complaint, that the heirs of Job W. Warner, deceased, owned twenty-five acres of land outside the corporate limits of Elwood, Indiana, in the northeast corner of section nine. There was a highway on the north line of said section, thirty feet wide, one-half of which was located on said real estate, and a highway on the east line of said section, one-half of which was located on said real estate. Said heirs sold and conveyed to appellee a part of said twenty-five acres, which was described as follows: "Beginning at a point thirty feet south, and thirty-three feet west of the northeast corner of section 9, township 21 north, of range 6 east, running thence south 120 feet, thence west 147 feet, thence north 120 feet, and thence east 147 feet, to the place of beginning." Such description left a strip fifteen feet wide between the real estate conveyed to appellee and the highway

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on the north, and a strip thirteen feet wide between the real estate conveyed to appellee and the highway on the east. Afterwards appellant built a switch running east and west upon said strip fifteen feet wide, adjoining appellee's real estate on the north. The allegations in the complaint are sufficient to show that the parcel of real estate fifteen feet wide, bounded by the south side of the highway on the north and appellee's real estate on the south, was dedicated by the owners thereof to the public use, and it became a part of the public highway before said switch was built by appellant. If said parcel of real estate was so dedicated to the public use, the south boundary of said highway so widened became the north boundary of appellee's real estate, and she was entitled to use the same as a means of ingress and egress to her premises upon which she resided. Appellee, under such circumstances, would not be the owner in fee simple of any part of such highway, or of any real estate either north of her north line or east of her east line. Appellee cannot, therefore, maintain an action for the obstruction of said highway, unless she has sustained some special injury, one not common to all who use the highway. *Indiana, etc., R. W. Co. v. Eberle*, 110 Ind. 547, 552; *Ross v. Thompson*, 78 Ind. 90; *Dwenger v. Chicago, etc., R. W. Co.*, 98 Ind. 153, 156, and cases cited; *People's Gas Co. v. Tyner*, 131 Ind. 277, 283, and cases cited; *Haslett v. New Albany, etc., R. R. Co.*, 7 Ind. App. 603.

The allegations in the complaint show, however, that appellant's switch as constructed east and west along said alleged public highway, although not upon appellee's real estate, materially interrupted appellee's means of access to her property; this is a special injury different in kind from that suffered by the public generally, and entitles appellee to maintain an

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action for damages. *Indiana, etc., R. W. Co. v. Eberle, supra; Grand Rapids, etc., R. R. Co. v. Heisel*, 38 Mich. 62, 31 Am. Rep. 306. We think, therefore, that the court did not err in overruling the demurrer to the complaint. As to what allegations are necessary to show that the owner of real estate abutting on a highway owns the fee simple to the middle of such highway, see *Erwin v. Central Union Tel. Co.*, *post*, 365.

One of the questions to be determined under the allegations in the complaint was, whether the real estate upon which appellant had constructed its switch was in the public highway. Appellant's contention was that the ground upon which the switch was laid was no part of the public highway; that the heirs of Job W. Warner, the owners of said twenty-five acre tract, after the conveyance to appellee, sold and conveyed to appellant said strip fifteen feet wide north and south, and extending the entire length of said twenty-five acre tract east and west; the north boundary being the south line of the highway running east and west on the north line of said section 9, and the south boundary being the north line of the real estate conveyed to appellee, and that the switch was constructed on said strip, conveyed to and owned by appellant. Appellee's contention was, that before the conveyance to appellant, said real estate had been dedicated to the public use by the Warner heirs, the owners thereof, and that the same was, when conveyed to appellant, a part of the highway. During the progress of the trial appellee, as tending to show said dedication, proved by several witnesses that after the conveyance to appellee the Warner heirs removed the fence on the line between the highway and the real estate afterwards conveyed to appellant, thus leaving said real estate uninclosed. Appellant, at the proper time, offered to prove by a competent witness that

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said fence was removed and said real estate left unclosed without any intention to make the same a part of the public highway or in any way to dedicate the same to the public use. The court excluded the evidence offered, and this is assigned as one of the causes for a new trial. It is contended by appellee that evidence of acts only was admissible, and that intention being only an operation of the mind, it was not competent for the witness to state the intent with which the act was done. It is the law in this State, however, that when the character of an act depends upon the intent with which it was done, the party may testify as to such intention. *Bidinger v. Bishop*, 76 Ind. 244, 255, and authorities cited; *Sedgwick, Admr., v. Tucker*, 90 Ind. 271, 281; *Heap v. Parrish*, 104 Ind. 36, 40, and cases cited. Appellee having given evidence of the removal of said fence as tending to show a dedication, it was error for the court to exclude evidence of the intention with which such act was done. This is not in conflict with the case of *City of Columbus v. Dahn*, 36 Ind. 330, cited by appellee. In that case a witness was allowed by the trial court to testify that he never intended to dedicate certain real estate as a street, which was properly held error. The witness in that case was not asked the intention with which he had done any particular act which had been proven, as tending to show a dedication, as in this case, but as to his intention generally, not connected with any act. Under the authorities, a party may testify as to the intention with which he did any act when such intention is material, but not as to his intention disconnected from any act. We adhere to the rule declared in *City of Columbus v. Dahn, supra*; *Faust v. City of Huntington*, 91 Ind. 493, and *City of Indianapolis v. Kingsbury*, 101 Ind. 201, that when the declaration, acts, and conduct of the landowner are such as fairly

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and naturally lead to the conclusion that he intended to dedicate the land to public use, and others have in good faith acted upon his open acts and declaration, the fact that the landowner may have entertained a different intention from that manifested by his acts and declarations is of no consequence; such secret intentions cannot prevail against the force of his conduct and acts, upon which the public or those dealing with him have relied.

The court instructed the jury concerning the measure of damages, that they might "take into consideration the injury to the property, if any, naturally resulting from building the switch, in rendering the same inconvenient of access, if it was so rendered, or in any manner causing the same to be less suitable for use, together with the increased danger from fire emitted from the locomotives, and the decreased rental value of the property, together with all the facts proven which show a natural and necessary decrease in the value of the property." It was the duty of the jury to assess the damages upon the theory that the switch was constructed upon the public highway, and that appellee was not the owner in fee simple of any part of said highway. This charge invited the jury into the broadest field of inquiry and to the consideration of all possible elements affecting the value of the property, and ignored entirely the settled rule that, as appellee has only the right of abutting owner, and has no right growing out of the ownership of the fee in the highway, she cannot recover any damages for injuries common to the community in general, but she is confined to damages for such injuries as are substantially different in kind from those suffered by the community in general.

In *Indiana, etc., R. W. Co. v. Eberle, supra*, this court said: "The community in general does not, of course,

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mean those persons who use the street or highway, and yet reside at such a distance from the railroad as to suffer none of the annoyances or inconveniences incident to its construction and operation. The interest in the street which is peculiar and personal to the abutting lot owner, and which is distinct and different from that of the general public, is the right to have free access over it to his lot and building, substantially in the manner he would have enjoyed the right in case there had been no interference with the street. The right of access by way of the street is an incident to the ownership of the lot, which cannot be taken away or materially impaired without liability to the owner to the extent of the damage actually incurred. In this respect, and in this only, is the interest of the abutting property owner different in the street in front of, and beyond the line of his lot, from that of the public.

"The location and operation of a railroad upon a public highway may occasion incidental embarrassment and inconvenience to an abutting lot owner, but until it cuts off or materially interrupts his mode of access to his property, or imposes some additional burden on the soil, his injury and damages, while different in degree, are the same in kind as are those of the community at large.

"For such merely incidental damages as result from the careful construction and prudent operation of a railroad on the land of another, even though it be in a public street, the adjacent proprietor cannot recover. These are injuries common to all those whose lands are in such close proximity to a railroad which happens to be located on the land of another, as to suffer incidental injury therefrom. For such injuries or inconveniences, in the absence of a statute giving him redress therefor, the property owner is not entitled

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to maintain an action. *Grand Rapids, etc., R. R. Co. v. Heisel*, 38 Mich. 62, 31 Am. Rep. 306; *Central Branch, etc., R. R. Co. v. Andrews*, 30 Kan. 590; *City of Chicago v. Union Building Assn.*, 102 Ill. 379, 40 Am. Rep. 598; *Rigney v. City of Chicago*, 102 Ill. 64." The law as declared in *Indiana, etc., R. W. Co. v. Eberle, supra*, was approved by this court in *Dantzer v. Indianapolis, etc., R. W. Co.*, 141 Ind. 604, and *Decker v. Evansville, etc., R. W. Co.*, 133 Ind. 493.

It was also error to include in said instruction "the increased danger from fire emitted from the locomotives," as an element of damages, for the reason that under the doctrine declared in the case last cited such damages were merely incidental, resulting from the construction and operation of said switch, and while perhaps different in degree were the same in kind as "were common to all those whose lands were in such close proximity to the switch which happened to be located on the land of another." Said error was not cured by giving an instruction which excluded some of the elements included in said erroneous instruction. The error could only have been cured by the withdrawal of the erroneous instruction from the jury, which was not done. *Wenning v. Teeple*, 144 Ind. 189, 195, and cases cited. Besides, if two or more instructions are inconsistent and calculated to mislead the jury or leave them in doubt as to the law, it is cause for reversal. *Wenning v. Teeple, supra*, p. 195, and cases cited.

Appellant insists that there is not sufficient evidence to sustain the verdict, and that the same is contrary to law. This court cannot consider these causes for a new trial, because the same depend for their determination upon the evidence, which, as affirmatively appears from the bill of exceptions, is not all in the record. The bill of exceptions shows that a deed from

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Leathy Warner, widow, Josie W. Harting and Sherman Harting, her husband, dated July 28, 1894, was read in evidence, but the same is not copied into the bill of exceptions, although a blank space is left for that purpose. It is settled law in this State that, if a bill of exceptions purports to contain all the evidence, yet it is shown upon its face that it does not, this court will not consider the sufficiency of the evidence to sustain the verdict of a jury or the finding of a court. *Weaver v. Kennedy*, 142 Ind. 440, and cases cited; *McGinnis v. Boyd*, 144 Ind. 393; *Chicago, etc., R. W. Co. v. Eggers*, 147 Ind. 299.

It appears from the evidence and the special verdict that, in the deed conveying to appellee the parcel of real estate described in the complaint, there was also described a tract of the same size lying immediately west of said first named tract, and extending to the west line of said twenty-five acres, but separated from the first named tract by a strip sixteen feet wide. These two parcels of the twenty-five acres were owned by appellee, and the evidence as to the damages to appellee's real estate included both parcels, and the damages to both parcels were considered and assessed by the jury; while only one of said tracts, the east one, is described or mentioned in the complaint. Under the issues appellee was only entitled to recover damages for injuries to the east tract. It follows, therefore, that, for this reason, the court erred in rendering judgment upon the special verdict in favor of appellee. The description in the complaint of the twenty-five acre tract is defective because the lines do not close, unless the word "south," in the third line of the description, is read "north."

For the reasons given, the judgment is reversed, with instructions to sustain appellant's motion for a new trial, and with leave to file an amended complaint if desired.



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 Mitchell v. St. Mary et al.
 

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## MITCHELL v. ST. MARY ET AL.

[No. 18,242. Filed May 25, 1897.]

148	111
160	664
148	111
168	630

**APPEAL AND ERROR.**—*When Rulings on Demurrers May be Disregarded.*—Questions on demurrers to pleadings may properly be disregarded on appeal, where every phase thereof is presented on special findings and conclusions of law. *p. 113.*

**BILLS AND NOTES.**—*Waiver of Defenses on the Ground of Extension of Time of Payment.*—A stipulation in a note payable in bank, that "the drawers and endorsers waive all defenses on the ground of any extension of time of payment," does not take away its negotiability under sections 7515, Burns' R. S. 1894, but does take away its character as commercial paper, under section 7520, Burns' R. S. 1894. *p. 113.*

**SAME.**—*Endorsement.*—*Complaint.*—*Statutes Construed.*—Where the character of a note as commercial paper, within the meaning of section 7520, Burns' R. S. 1894, has been taken away by a stipulation that the drawers and endorsers waive all defenses on the ground of any extension of time of payment, a complaint thereon is insufficient as to an endorser in blank, where there is no allegation of the use of due diligence as is required by section 7518, Burns' R. S. 1894. *pp. 113-115.*

**SAME.**—*Custody of Note Endorsed in Blank.*—The rule that the custody of a note endorsed in blank is *prima facie* evidence of ownership does not apply to a note which does not possess the qualities of commercial paper. *p. 115.*

**PLEADING.**—*Action for Corporation Cannot be Maintained in Name of Officer who is a Mere Agent.*—The treasurer of a corporation, to whom a note has been transferred as a mere custodian of the corporation, is not a trustee of an express trust, within the meaning of section 252, Burns' R. S. 1894, and, therefore, cannot maintain an action on the note in his own name. *pp. 113-115.*

From the Noble Circuit Court. *Affirmed.*

*H. G. Zimmerman and P. D. Keager*, for appellant.

*R. P. Barr*, for appellees.

**HACKNEY, J.**—This was a suit by the appellant, John Mitchell, upon four promissory notes, and to fore-

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*Mitchell v. St. Mary et al.*

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close a mortgage of certain real estate securing said notes. The notes were executed by Peter St. Mary to Curran F. Cain, were payable in a bank, and contained a stipulation that "the drawers and endorsers severally waive presentment for payment, protest," etc., and "all defenses on the ground of any extension of time of payment that may be given by the holder or holders to them or either of them." The complaint alleged the endorsement in blank by Cain of the notes, the assignment of the mortgage, and the transfer thereby to the appellant. Judgment was sought against Cain, as endorser, it is claimed. The trial court sustained Cain's demurrer to the complaint, and the appellee, St. Mary, in several paragraphs of answer, in various forms, pleaded that the appellant was not the real party in interest; that he purchased the notes and mortgage with the money of, and acting for and on behalf of the Lake View Cemetery Association, and that he held the same as the officer of said association, and was attempting to enforce the same in his own name, and without authority from said association. The court overruled demurrers to said answers. The appellant thereupon replied to said answers in affirmative paragraphs. One, alleging that he was the agent of said association in purchasing the notes and mortgage, and employed therein the funds of said association; that he took the assignments to himself as such agent, and holds the same as such and for the benefit of the association as the trustee of an express trust. Another paragraph alleged that he was treasurer for the association, and as such it was his duty to collect and account for the said fund to said association; and another paragraph alleged that he was one of the directors of the association; that he was chosen as such to act as agent for the association to purchase the notes and mortgage, and to take the assignment

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of the notes and mortgage, and to take the assignment thereof in his own name for the purpose of facilitating the collection thereof, and that he seeks to collect the same as trustee of an express trust in favor of the association. To these replies demurrers were sustained.

A trial resulted in special findings and conclusions of law in favor of the appellees to which appellant excepted. These several rulings are here urged for the reversal of the judgment of the lower court. Every phase of the questions arising upon the rulings upon demurrers to the answers and to the replies is presented upon the special finding and conclusions of law, and said rulings may, therefore, be properly disregarded. *Smith, Trustee, v. Wells Mfg. Co.*, post, 333, and cases there cited.

That the notes in suit were negotiable under section 7515, Burns' R. S. 1894, so as to vest title therein, is not questionable, but that they were commercial paper, "as inland bills of exchange," under section 7520, Burns' R. S. 1894, is not only doubtful, but the reverse has been decided, owing to the stipulation permitting an extension of the time of payment. *Glidden v. Henry*, 104 Ind. 278; *Brown v. First Nat'l Bank*, 115 Ind. 572; *Oyler v. McMurray*, 7 Ind. App. 645; *Merchants', etc., Bank v. Frazee*, 9 Ind. App. 161.

The complaint, as to Cain, not having alleged the use of due diligence as required by section 7518 Burns' R. S. 1894, was not, in view of the character of the paper, sufficient. *Smythe v. Scott*, 106 Ind. 245; *Somerby v. Brown*, 73 Ind. 353; *Hayne v. Fisher*, 68 Ind. 158; *Couch v. First Nat'l Bank*, 64 Ind. 92.

The facts specially found were, that Lake View Cemetery Association was, at the time of the transactions under investigation, a corporation of which appellant was treasurer and had custody of its moneys with the

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duty of lending the same; that in June, 1894, Cain endorsed the notes described, in blank, and gave one Campbell authority to dispose of them; that Campbell sold them to said association, said Mitchell paying its money therefor, and said notes with said endorsement were delivered to Mitchell as such treasurer, and as the property of said association and not otherwise; that on said date Cain assigned said mortgage to Mitchell, but that Mitchell received the same and the notes as the property of the association; that Mitchell never claimed any title to or interest in said notes and mortgage or the proceeds thereof, but the same were by him entered upon the books of the association to its exclusive credit, and it was, and still is the owner thereof. It is found also that Mitchell had never held said notes, excepting as treasurer, and the mere custodian for the association; that he was never authorized to sue upon said notes in his own name, but prosecutes the suit without the knowledge or direction of the association, and without any right so to do.

The conclusion of law was that Mitchell had no right to maintain the suit. It is apparent that the court went fully into the question of the right or authority of the appellant to prosecute the suit in his own name, and that there was a finding upon every fact pleaded in the affirmative replies. Section 251, Burns' R. S. 1894, provides that "Every action must be prosecuted in the name of the real party in interest, except as otherwise provided in the next section." The exception there said to be applicable is that "a trustee of an express trust, \* \* \* may sue, without joining with him the person for whose benefit the action is prosecuted. A trustee of an express trust, within the meaning of this section, shall be construed to include a person with whom, or in whose name, a contract is made for the benefit of another."

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Appellant's learned counsel first insist that section 251, *supra*, does not apply to the holder or alleged endorser of commercial paper, since, it is claimed, the custody of paper endorsed in blank is *prima facie* evidence of ownership, and payment by, or recovery against the maker will be protected against another claiming to own the paper; that this was the rule when the code was adopted, and will be accepted as still the rule. Since, as we have seen, the paper here in question does not possess the qualities of commercial paper, the rule insisted upon would not obtain if in force, notwithstanding the code. See *Swift v. Ellsworth*, 10 Ind. 205; *Deuel v. Newlin*, 131 Ind. 40; *Bostwick v. Bryant*, 113 Ind. 448.

The facts specially found, instead of disclosing that the appellant was the trustee of an express trust, discloses that he was a mere agent for the custody of the paper, not named in the paper as trustee, and acting in the suit with neither authority nor consent of the association, and that his own name was connected with the transaction without an intention to make him a trustee. Cases in point are *Swift v. Ellsworth*, *supra*; *Rawlings v. Fuller*, 31 Ind. 255.

The cases of *Heavenridge v. Mondy*, 34 Ind. 28; *Wolcott v. Standley*, 62 Ind. 198; *Holmes v. Boyd*, 90 Ind. 332; *Rinker v. Bissell*, 90 Ind. 375; *Landwerlen v. Wheeler*, 106 Ind. 523, and the class to which they belong have no force in this case since they disclose contracts from which a trust relation affirmatively appears, or where the suit is to enforce the demand as one of a trust character. There must be something in the nature of the contract, appearing upon its face or from allegations in the pleadings, disclosing that a trust relation exists and is sought to be enforced for the benefit of the *cestui que trust*. It is not enough that an agent who exceeds his authority in suing in his own

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name upon a demand due his principal is an agent and may intend to account for the recovery. He cannot bind his principal without authority expressed or implied, and it is only when the principal may be deemed to be in court and bound by the proceeding that section 252, *supra*, is intended to apply.

There was no error in the action of the trial court, and the judgment is affirmed.

## HABBE v. VIELE.

[No. 18,009. Filed Jan. 13, 1897. Rehearing denied May 25, 1897.]

148	116
152	124
148	116
161	180

**APPEAL AND ERROR.—*New Trial.*—*Record.*—*Presumption.*—**Where all that is shown by the record as to the filing of a motion for a new trial is that it was taken up and presented for the consideration of the court, the parties being present, it will be presumed on appeal that the motion was duly and properly filed. *pp. 117, 118.*

**SAME.—*Weight of Evidence.*—*Sufficiency of Evidence.*—**The weight of the evidence is for the trial court, but its sufficiency to sustain the findings of the trial court may be considered on appeal. *p. 121.*

**REFORMATION OF LEASE.—*Mistake.*—*Sufficiency of Evidence.*—**In an action to reform a lease the evidence showed that the tenant of a certain storeroom, desiring to quit business procured defendant to take up the lease, to which plaintiff consented. Plaintiff drew up a contract by which the premises were leased to defendant for the unexpired term of the lease at a rental of \$3,400.00 per year, it being agreed at the time that at the expiration of the lease defendant was to have the storeroom for an additional term at a fair and reasonable rental. The evidence further showed that a competitor of defendant desired the room and offered plaintiff more rent and a bonus; that plaintiff's husband, acting as her agent, proposed to defendant to extend the lease for a term of five years, at \$3,000.00 per year, and a bonus of \$500.00; that after defendant had taken time to consider the proposition, and the matter had been further discussed, the plaintiff's said husband drew up the lease which was for a term of seven years, at a rental of \$2,000.00 for the first two years, and \$3,000.00 for the last five and a bonus of \$500.00; that a typewritten copy of the lease was made, and the plaintiff acknowledged them in duplicate, the original being recorded, and the copy delivered to defendant, at which time the defendant paid the \$500.00 bonus; that when the first month's rent became due, defendant, for

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the purpose of paying the rent, drew his check for \$166.66, and plaintiff drew a receipt for \$200.00, claiming that there had been a mistake in drawing the lease. *Held*, that the evidence was insufficient to show that there had been a mutual mistake in the execution of the lease. *pp.* 118-124.

**APPEAL AND ERROR.**—*Vacation Entry by Clerk will be Disregarded on Appeal.*—A statement in a transcript that a motion for a new trial was filed with the clerk in vacation is no part of the record, and will be disregarded on appeal. *p.* 126.

From the Vanderburgh Circuit Court. *Reversed.*

*J. W. Spencer and J. R. Brill*, for appellant.

*J. E. Williamson*, for appellee.

HOWARD, J.—This was an action brought by appellee to reform a lease given by her to appellant for a double store room in the city of Evansville. The court found for appellee and entered a decree reforming the lease as prayed for. It is contended that the evidence does not support the finding.

Appellee does not discuss the question raised in appellant's brief, but contents herself with saying that there is evidence in the record to support the finding. She does contend, however, that the appeal is not properly before the court, for the reason that the motion for a new trial in the court below was not filed at the proper time. We do not think the question so raised by the appellee has been properly saved and presented for our consideration. The court entertained and passed on the motion for a new trial without objection or exception by appellee. The record shows that the findings and judgment were had on the last day of the September term of court. The motion for a new trial might, therefore, be made on the first day of the next, or December term. Section 570 Burns' R. S. 1894 (561, R. S. 1881); *Evansville, etc., R. R. Co. v. Maddux*, 134 Ind. 571. The motion for a new trial was

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taken up and presented for the consideration of the court on the thirteenth judicial day of the December term, the parties being present. In the absence of any objection then or thereafter taken to the action of the court in entertaining and passing upon the motion, we must presume in favor of the regularity of such action, and, consequently, that the court found the motion to have been filed at the proper time. See *World's Fair, etc., Co. v. Gasch*, 162 Ill. 402, 44 N. E. 724.

Did the error in fact exist, the attention of the trial court should have been called to it that it might be corrected. Moreover, if the party excepting were still dissatisfied with the ruling, the alleged error should be shown to this court, as in *Emison v. Shepard*, 121 Ind. 184, to which we are cited by counsel.

It appears that appellee, who was represented by her husband, Charles Viele, as agent, was the owner of the double store in question, and that the same had been rented for many years to J. F. Lindley & Son, and to their predecessors, at an annual rental of from \$1,500.00 to \$2,400.00, the latter amount being the rental at the date of the proceedings. The Lindley lease was in parol, and had two years to run from January 1, 1895. The Lindleys desiring to quit business procured appellant to take the lease off their hands. To this appellant consented, and Charles Viele drew up a written contract by which the premises were turned over to appellant for the unexpired term of the lease at the rental of \$2,400.00 a year. Appellant was engaged in the clothing business, and it seems that he had a rival whose place of business was next door to appellee's store, and who, about the time when the negotiations were completed, offered the Lindleys a bonus for the unexpired term of the lease. Charles Viele, however, told Lindley that the negotiations with the appellant had proceeded too far, and



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the offered bonus was rejected. At the time of accepting appellant as tenant, it was agreed between appellant and appellee that appellant was to have the store room at the end of the Lindley lease, "for an additional term, at a fair and reasonable rental." Soon after this contract was made, Viele went to appellant with a proposition that appellant should continue as tenant after the expiration of the Lindley lease, that is, after January 1, 1897, saying at the same time, that he "had an offer of five years' extension to the present term at \$3,000.00 a year rent, and \$500.00 bonus." Appellant asked who had made that offer, but Viele answered: "Do not ask any questions." Appellant then said he would have to have time to consider the proposition. About a week's time was agreed to, Viele leaving his proposition in writing: "Five years' extension at \$3,000.00 per year, and \$500.00 bonus."

Viele returned at the appointed time. Up to this, there is little or no discrepancy in the evidence. Mr. Viele's testimony now continues: "I went to Mr. Habbe and asked him what he had decided to do. He hesitated a moment and said he would accept my proposition. I then asked him who his attorneys were, and who he preferred should draw the lease. He said [after naming the attorneys] he was not particular about who drew the lease. I told him I had been renting property and writing leases for forty years or more and would, if agreeable to him, prepare the lease myself and save an attorney's fee. I went home and drew the lease and gave the same to Mr. Sonntag to have a type written copy made, and he made the same, took the copy with the original to Mr. Habbe, after having taken them both to my wife, Mary J. Viele, [the appellee], and having her sign and acknowledge the same. Mr. Sonntag returned the original lease in my handwriting to me, and left the typewritten copy with Mr. Habbe. I had the lease recorded."

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Appellant's version of these negotiations is as follows: "Mr. Viele came to me and said he had a proposition submitted to him for the rental of that building from the first of January, 1897, for five years at \$3,000.00 a year and \$500.00 bonus. I asked him whose proposition it was, and he said, 'Ask no questions.' \* \* \* I had rather a heated conversation with Mr. Viele. I told him that I could not give him an answer. I said 'Mr. Viele, do you recollect that conversation I had with you, that I was to be the continuous tenant at a fair and reasonable rental? I believe I know the reason this proposition has been submitted to you. Mr. Viele don't you know that if you took me out of competition for this building that you could not get \$2,400.00 a year for it, much less \$3,000.00 a year for it, and that it was not right to treat a tenant like that?' 'Well,' he said, 'a man has got to do the best he can.' I did not take this in good faith. This is about all I said to Mr. Viele at that time. Now when he came to me about this building, I guess that I gave him to understand that the proposition he submitted to me was impossible, and I spoke of the expense of moving, and that I would not be out of there until the 15th of August, and said that I would have to have time to consider that. And a short time after that Mr. Viele came to my store at 209 Main street, and he began talking about the building, and I was telling him about the expense of repairs and moving; and then he said: 'Mr. Habbe, you may have the building the first two years at \$2,000.00 per year, and for five years after that at \$3,000.00 per year, and a bonus of \$500.00.' Well, in any event, Mr. Viele made this agreement. That is the second time he came back. The proposition was \$2,000.00 a year for two years, \$3,000.00 for five years, and \$500.00 bonus. I calculated that mentally and knew that my rent

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would be raised, but that I would get a much longer term on the building. I told Mr. Viele that the proposition was acceptable. \* \* \* Mr. Sonntag came down there with the new lease in Mr. Viele's own handwriting and brought a typewritten copy, each signed by Mrs. Mary J. Viele, and inasmuch as this was a term of seven years' lease, I took the two leases and read them carefully and compared them, and found that they set out the contract exactly as I understood it, and just as Mr. Viele had stated it to me. I then signed them both; and I believe that Mr. Sonntag took them away with him, I think for the purpose of having something done to them by a notary public, to put his seal on them. When he brought it back I gave him a check for \$500.00 and that completed the lease."

When the time came for paying the first month's rent, that from January 1, 1895, appellant drew his check for \$166.66, being at the rate of \$2,000.00 a year; while appellee drew a receipt for \$200.00, being at the rate of \$2,400.00 a year. This began the controversy which finally resulted in the present action, appellant insisting that the lease as drawn by Mr. Viele was in accordance with their agreement, while Mr. Viele himself declared that he had made a mistake in drawing the lease, and that it was not according to the contract.

The question here is not as to the weight of the evidence, but as to its sufficiency. The weight of the evidence was for the trial court, but its sufficiency to sustain the findings may be considered by this court. *Lake Erie, etc., R. R. Co. v. Stick*, 143 Ind. 449; *Wabash Paper Co. v. Webb*, 146 Ind. 303.

It is said by Mr. Bispham in his work on equity, section 196, that "Equity will not grant relief in cases of mistake except upon very clear evidence. Where it

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is admitted in the answer, there can, of course, be little difficulty in granting relief; but where the fact of mistake is denied in the answer, evidence to overcome such denial must be of the most persuasive character."

"To reform a contract, and then enforce it in its new shape," says the same authority, section 469, "calls for a much greater exercise of the power of a chancellor than simply to set the transaction aside. Reformation is a much more delicate remedy than rescission. Hence, in order to justify a decree for reformation in cases of pure mistake, it is necessary that the mistake should have been mutual. Where the mistake has been on one side only, the utmost that the party desiring relief can obtain is rescission, not reformation." And again, "A person who seeks to rectify a deed on the ground of a mistake must establish, in the clearest and most satisfactory manner, that the alleged intention to which he desires it to be made conformable continued concurrently, in the minds of all parties, down to the time of its execution." See, also, *Stockbridge Iron Co. v. Hudson Iron Co.*, 107 Mass. 290, at pp. 316, 317; *Green v. Stone*, 54 N. J. Eq. 387, 34 Atl. 1099; and 2 Beach Contracts, section 870, and notes.

"The writing," said this court in *Dale v. Evans*, 14 Ind. 288, "should be read by the light of surrounding circumstances, to understand the meaning and intent of the parties, and, if necessary, that far parol evidence might be received; 'but, as the parties have constituted the writing to be the only outward and visible expression of their meaning, no other words are to be added to it, nor substituted in its stead.' 1 Greenleaf on Ev., section 277. And therefore, 'all testimony of a previous colloquium between the parties, or of conversation or declarations at the time when it was completed, or afterwards, as it would tend, in many in-

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stances, to substitute a new and different contract for the one which was really agreed upon, to the prejudice, possibly, of one of the parties, is rejected.' *Id.* section 275. These are salutary rules of evidence, and should not be departed from, even in equity, unless in instances where the evidence offered is clear, and unambiguous, and relief should not be extended where the evidence is loose, equivocal, contradictory, or in its texture open to doubt or opposing presumptions. 1 Story's Eq., section 157." See, also, *Linn v. Barkey*, 7 Ind. 69; *Citizens', etc., Bank v. Judy*, 146 Ind. 322; *Board, etc., v. Owens*, 138 Ind. 183, and authorities cited on pp. 186 and 187.

Tested by these principles, we do not think that any evidence given on the trial was sufficient to show that the lease ought to be reformed as prayed for. There was evidence to show that the appellee may have understood the agreement to have been that the rent for the first two years should be at the rate of \$2,400.00; but we do not think that any such evidence was of that "persuasive character" needed to show that this was also the understanding of the appellant. The evidence is certainly not such as to "establish in the clearest and most satisfactory manner" the mutuality of the alleged mistake. If the appellant at the time the terms of the lease were agreed upon, understood these terms to be as appellee now contends for, such understanding must be drawn from vague and uncertain inferences, rather than from any clear or unequivocal evidence found in the record.

If "the writing should be read by the light of surrounding circumstances," as said in *Dale v. Evans*, *supra*, then many reasons will be suggested to show that the agreement was as the lease was written. The appellant went to the new location with the expectation and agreement that he should remain for many

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years, "at a fair and reasonable rental." He was, therefore, anxious to enter into the new and long time tenancy. Yet he might well be indignant that advantage should be taken of a rival's offer of a large bonus and increased rental, to force him into making a contract less favorable than he had a right to anticipate. On the other hand, the \$500.00 cash, with an addition, after two years, of \$600.00 a year to her former rental, would act persuasively on the mind of the appellee. The compromise shown in the lease would be a natural outcome. That Mr. Viele, shown to be over seventy years of age, and having been for so long accustomed to draw \$200.00 a month rent, should have forgotten the terms of the compromise, does not seem improbable.

The "proposition" made to appellant, and which Mr. Viele says he put into writing, was: "Five years' extension at \$3,000.00 per year and \$500.00 bonus." This proposition, Mr. Viele says, appellant agreed to; and that is not denied by the appellant. On the contrary, he has paid the bonus, and stands ready to carry out the other terms of the lease as stated in the proposition agreed to. But he says, that to induce him to agree to the "proposition," appellee consented to reduce the rent for the first two years from \$2,400.00 to \$2,000.00 a year. We do not think there is a particle of evidence in the record to show that appellant ever understood that the lease should not be drawn to make this reduction. If there is any such evidence it must be by way of inference, and only of the most meager and unsatisfactory character.

Besides, it is to be remembered that appellant already had, by assignment, a lease for the first two years, at \$2,400.00. If the new lease was made to include this time, together with the "five years' extension," it must have been for some purpose. The com-

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promise shown in the new lease, as written, would seem to disclose such a reasonable purpose, namely, a reduction of the rent for this period in consideration of the increase for the five-year period and the bonus.

Another reason may be mentioned why the reformation asked for ought not to be granted. Unless in case of the clearest evidence of inadvertence, relief should not be granted if the mistake is the result of the party's own negligence, or that of his attorney. "Under this head," says Mr. Bispham, in the work already cited, section 191, "should be classed mistakes into which a party has fallen, because he has not made use of the means of inquiry which were open to him; as (for instance) where he has not taken the trouble to read the paper which he was executing." See, also, *Kerr Fraud and Mistakes*, Am. Ed. 407; *Glenn v. Statler*, 42 Iowa 107.

Charles Viele, the husband and agent of appellee, himself wrote the lease, and appellee signed and acknowledged it in duplicate, before it was taken to appellant. After its execution with these formalities she placed it on record. Ought not appellee after all this, be conclusively held to know the contents of the lease; particularly when there is only the vaguest evidence to show that appellant did not understand it to be just as appellee had written it? This is not the case of a scrivener committing an agreement to writing in terms different from the mutual understanding of the parties. Mr. Viele wrote the lease himself, had a type-written copy made, had his wife sign and acknowledge the original and the copy, then put it on record. He ought to know the contents.

The judgment is reversed, with instructions to grant a new trial.

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*Habbe v. Viele.*

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## ON PETITION FOR REHEARING.

HOWARD, J.—The learned and accomplished counsel for appellee seems to have misapprehended, in some degree, the force of our decision as to the filing of the motion for a new trial. The record proper fails to show when this motion was filed. It should, of course, as required by statute, have been filed on the first day of the December term. The showing made in the record, however, as said in the original opinion, is, simply, that “the motion for a new trial was taken up and presented for the consideration of the court on the thirteenth judicial day of the December term, the parties being present.” From the circumstances that the court then considered and ruled upon it, we must presume that the motion was regularly before that tribunal, that is, that the motion had been duly filed, as required by law. Nothing further was decided as to this matter in the original opinion.

As to the statement found in the transcript, that the motion was filed with the clerk in vacation, and previous to the first day of the term, even if that statement should be regarded, it would not follow that the motion was not afterwards, and at the proper time, duly filed in court. But it is, rather, to be said, that the clerk’s so-called “vacation entry” to show such filing, is no part of the record, and that it was, therefore, not regarded or alluded to in the original opinion. There can be no such thing as a court order made by a vacation entry of the clerk. Orders are made by the court itself, or, in certain cases, by the judge in vacation. This “vacation entry” is to be wholly disregarded. The record, therefore, failing to show anything in relation to the filing of the motion for a new trial, and the court having taken up and passed upon the motion at a time after the day when it should have



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been filed, we must, as before said, "presume in favor of the regularity of such action, and, consequently, that the court found the motion to have been filed at the proper time." So it was held in *Secor v. Souder*, 95 Ind. 95, cited by appellee that, "nothing to the contrary being shown, the presumption is the court decided rightly." In the cases cited and relied upon by counsel, the filing of, or the offer to file, the motion for a new trial was shown by the record to have been out of due time. Here, there being no showing as to this matter, the presumption in favor of the court's action must control.

Petition overruled.

## SMITH v. PARKER.

[No. 17,836. Filed Jan. 15, 1897. Rehearing denied May 25, 1897.]

**FRAUD.**—*Representations Upon Which Action Can Be Predicated.*—Representations upon which an action for fraud can be predicated must be of alleged existing facts, and not upon promises to be performed. *pp. 131-133.*

**DAMAGES.**—*Basis of Action.*—*Refusal to Loan Money.*—*Measure of Damages.*—In contemplation of law money is always in the market and procurable at the lawful rate of interest, and the measure of damages for refusal to loan money pursuant to agreement is the difference between the interest agreed to be paid and what plaintiff was compelled to pay to borrow the money; and where no statement is made in the complaint of the rate of interest that defendant was to receive, and no statement of what the current rate of interest was, or what the money could have been procured for, no basis can be fixed for estimating or measuring the damages. *p. 133.*

**CORPORATIONS.**—*Contract Entered Into by Promoters.*—A corporation is not bound by a contract entered into by its promoters, unless, after its organization, it adopts such contract. *pp. 133, 134.*

**SAME.**—*Stockholder.*—*Breach of Contract.*—A stockholder of a corporation cannot maintain an action against a third party for a breach of contract with the corporation. *p. 134.*

**APPEAL AND ERROR.**—*Nominal Damages.*—*Failure to Assess.*—A judgment will not be reversed in this court for failure to assess nominal damages. *p. 134.*

148	127
164	430
148	127
171	527

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From the Hendricks Circuit Court. *Affirmed.*

*S. M. Shepard, Brill & Harvey and McBride & Denny*, for appellant.

*E. G. Hogate and J. L. Clark*, for appellee.

MCCABE, J.—The circuit court sustained a several demurrer to each of the two paragraphs of the complaint for want of sufficient facts, and the plaintiff refusing to amend or plead further, and standing upon his complaint, the court rendered judgment for the defendant.

The substance of the first paragraph of the complaint is as follows: The plaintiff complains of the defendant and says that on March 9, 1886, he obtained letters patent of the United States for an improvement in flour scoops and sifters; that afterwards, on April 26, 1887, Elmer E. Smith (a son of his plaintiff), Alfred Welshans, Elisha H. Hall and Chester F. Hall, organized a corporation under the laws of Indiana, for the purpose of manufacturing and selling flour scoops and sifters, strainers, etc.; that the capital stock of said company was fixed at \$5,000.00; afterwards said company which had adopted the name of "The Smith Manufacturing Company," made a contract with plaintiff whereby it was agreed, that the said company should have the right to manufacture flour scoops and sifters and other articles, under the said letters patent, so issued to this plaintiff, and as a compensation for such right and license, the company agreed to, and did issue to this plaintiff, paid up stock in said company, of one-fourth of the capital stock of said company, and by such agreement, was to and did thereafter, until, as otherwise hereinafter stated, pay to this plaintiff, as a royalty on each and every article made, or parts thereof made under said letters patent,

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one cent each on flour scoops and sifters, strainers, etc.; that the Smith Manufacturing Company commenced doing business immediately after such contract, and, although said company had limited means and small capital it succeeded in building up a large and rapidly growing business, and but for said limited means would have been able to have greatly enlarged its business; and thus matters stood until about the first of July, 1888, when the defendant, seeing the business was a prosperous one, and desiring to get control of the same, purchased the shares of capital stock owned by said Welshans and the two Halls. At the time of said purchase, plaintiff individually owned tools used in said business of the value of \$400.00; that plaintiff had owing to him on a contract for manufacturing said articles for said company the further sum of \$500.00; that when said defendant had purchased said shares of stock, and got an insight into its business, he represented to this plaintiff, that he, defendant, had plenty of means, and could command money in sufficient quantity to run said business upon a large scale, and, thereupon, defendant falsely and fraudulently represented to plaintiff that if plaintiff would consent to the formation of a new company and would assign his said patent to said new company, absolutely, and forego his, plaintiff's rights to royalties on articles manufactured under said patent, and would put in said tools and materials then on hand, and release his claim for money due on said contract with said old company, that they would form and organize a new company under the name of the William Smith Company, of Danville, Indiana; and if that was done defendant could and would furnish the new company with all the money it might require to make it a large and prosperous business, and this plaintiff having but

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little means, and being desirous of increasing said business, and relying upon the representations of said defendant, and fully believing that said defendant would furnish said new company means in abundance to run such business upon a large scale, thereupon plaintiff at the special instance and request of said defendant joined in the organization of the William Smith Company, of Danville, Indiana, as a corporation, under the laws of the State of Indiana, with a capital stock of \$10,000.00 of which \$2,000.00 was issued to plaintiff, and defendant received of such capital stock \$5,000.00.

Thereupon, plaintiff, relying upon such representations, did on July 7, 1888, assign his said letters patent to said William Smith Company; that immediately after such new company had been organized, defendant induced Frederick Neiger to purchase \$1,000.00 of said stock, and Mrs. Dempsey \$1,000.00; a Mr. Crabb \$5,000.00 and a Mr. Ferree \$50.00; said Crabb was then and there the father-in-law of said defendant, and said Ferree was a brother-in-law; so that in the family of said defendant there was a controlling interest in said capital stock of said new company, and that at the first annual meeting of the stockholders of said company, this plaintiff was purposely omitted from the directory of said company, and the said family combination took possession of all the principal official situations in said new company, and thereafter controlled and managed the said affairs of said new company, built a factory on credit, bought other patents on royalty, and run things as far as possible on credit, yet, notwithstanding the business was making money and doing a prosperous business, by reason of the expense of taking in other manufactures, and by the mismanagement of said defendant, Parker, and his failure to furnish money of his own to put into the

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business, said new company became insolvent. Defendant found in the course of the management of the business that said patents were valuable, and he determined to wreck said company and become the sole possessor of said patents, and to that end he studiously, fraudulently, and persistently refused to put in any money to run said business, but in every possible way sought by withholding his money so to embarrass said business as would, and finally did, result in the disaster to said business of said company. Afterwards, at the March term of the Hendricks Circuit Court for 1890, said Parker and others, filed in said court a petition for a receiver of said new company, and said Parker by virtue thereof had said business sold by a receiver, and said defendant, Parker, became the purchaser of the assets of said company, and the owner of said letters patent. And plaintiff says that by reason of said wrongful and fraudulent conduct of said defendant, the plaintiff has been deprived of said patent, which was and is valuable, and the use and benefit thereof; has lost his tools and materials so put in, and money so owing to said plaintiff by said old company, and is damaged thereby in the sum of \$50,000.00, wherefore, etc.

The theory of this paragraph, as counsel on both sides agree, is an action for damages caused by fraud. It is contended by the appellee's counsel, in support of the ruling of the court below, that the fraud or misrepresentation which affords a ground of action for damages must be as to an existing fact or facts. And hence it is argued that as the principal wrong complained of was appellee's failure to furnish the money to run the business of the new company, it does not amount to actionable fraud. Appellant's counsel seek to avoid this contention by urging that an action for damages arising out of a misrepresenta-

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tion may be maintained in respect to a fact to transpire in the future, if founded on promises that the defendant never intended to fulfill. They quote a portion of a section of Sutherland on Damages. But the whole section reads as follows:

"To entitle a party to maintain an action for deceit by means of false representations he must, among other things, show that the defendant made false and fraudulent assertions in regard to some fact or facts material to the transaction in which he was defrauded by means of which he was induced to enter into it. The misrepresentation must relate to alleged facts, or to the condition of things as then existent. It is not every misrepresentation relating to the subject-matter of the contract which will render it void, or enable the aggrieved party to maintain an action for deceit. It must be as to matters of fact substantially affecting his interests, not as to matters of opinion, judgment, probability or expectation. Representations made in respect to a fact to transpire in the future must be a mere promise or an opinion, and will not of themselves support an action for fraud, though a party may be liable for fraud by obtaining property on promises which he never intends to fulfill." Sutherland on Damages (2d ed.), section 1167.

There is no allegation in the paragraph in question that the appellee when he made the alleged promises never intended to fulfill them. Nor is there anything in the pleading from which that fact could be reasonably inferred, even if that would supply the place of an allegation of such fact.

In the case of *Child v. Swain*, 69 Ind. 230, also cited by appellant, it was expressly found that: "At the time said Child entered into said contract \* \* \* he did not intend to carry out and perform his part thereof, but he intended to get the money of said

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Swain and said Graham and give them no value therefor."

If it be said that the latter case was a suit for a breach of contract, and not for fraud, then it is wholly inapplicable to the paragraph in question which, as we have seen, is an action for damages for fraud.

It is settled law that representations upon which an action for fraud can be predicated, must be of alleged existing facts and not upon promises to be performed in the future. *Balue v. Taylor*, 136 Ind. 368; *Bennett v. McIntire*, 121 Ind. 231, and cases there cited.

Besides, this paragraph states no facts from which a basis can be fixed for estimating or measuring the damages. The measure of damages for refusal to loan money pursuant to agreement is the difference between the interest agreed to be paid and what the plaintiff was compelled to pay to borrow the money. In contemplation of law money is always in the market, and procurable at the lawful rate of interest. *Lowe v. Turpie*, 147 Ind. 652.

There is no statement of the rate of interest that appellee was to receive, and no statement of what the current rate of interest was, or what the money could have been procured for.

The second paragraph counts on the same facts and is, in theory, a suit for breach of the same contract to furnish the new company money to carry on its business. This contract run in favor of the new corporation before it was organized between two persons, who seem to have been its promoters. A corporation is not bound by such a contract, unless after its organization it adopts such contract. The obligation of the corporation does not rest on any supposed agency of the promoters and a ratification of their acts, but upon the immediate and voluntary act of the company. The adoption of such agreement by the corporation after

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its formation may be implied by the acts or acquiescence of the corporation or its agents without any express acceptance. After a corporation knowingly receives the benefit of an engagement entered into by its promoters prior to its organization, it will usually not be permitted to deny that it agreed to assume the corresponding burdens. 1 Morawetz on Priv. Corp., sections 547-549. The second paragraph sufficiently shows that the new corporation had knowingly received some of the benefits of said contract. And, therefore, it sufficiently appears that the new corporation had accepted and adopted the contract sued on, and as that contract is the obligation of the defendant to the new corporation and to nobody else, the question arises whether the appellant though a stockholder in the new corporation has any right of action for a breach of that contract; or in other words, does a breach of that contract make a cause of action in his favor against the defendant? That question has been answered in the negative by this court in *Tomlinson v. Bricklayers' Union, etc.*, 87 Ind. 308. It was there held that a cause of action in favor of a private corporation could not constitute a cause of action in favor of one of its stockholders. There are other defects in the paragraph in question. For instance, there are not facts enough stated to enable the court in applying the law to prescribe any measure of damages beyond nominal damages. *Lowe v. Turpie, supra*. A failure to assess nominal damages affords no grounds for the reversal of a judgment in this court. *Patton v. Hamilton*, 12 Ind. 256; *Hacker v. Blake*, 17 Ind. 97; *Black v. Coan*, 48 Ind. 385; *Mahoney v. Robbins*, 49 Ind. 146; *Wimberg v. Schwegeman*, 97 Ind. 528.

Moreover, the appellee's counsel present a very serious question which must be decided in favor of ap-



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pellant before he can have a reversal in contending as they do, that the contract to furnish money is so vague and uncertain as to what the defendant bound himself to do as to render it void. The rule is thus stated in *Thompson v. Gortner*, 73 Md. at p. 482: "The law is too well settled to admit of doubt, that in order to constitute a valid verbal or written agreement, the parties must express themselves in such terms that it can be ascertained to a reasonable degree of certainty what they mean. And if an agreement be so vague and indefinite that it is not possible to collect from it the full intention of the parties, it is void; for neither the court nor the jury can make an agreement for the parties. Such a contract can neither be enforced in equity nor sued upon at law." But the courts are not wholly confined to the language of the contract; where it is ambiguous, oral evidence may be resorted to to apply the contract to its proper subject-matter. An eminent author says: "Now, where does the law stop in this endeavor to remove uncertainty? We answer, not until it is found that the contract must be set aside, and another one substituted, before certainty can be attained. In other words, if the contract which the parties have made is incurably uncertain, the law will not or rather cannot enforce it; and will not, on the pretense of enforcing it, set up a different but valid one in its stead." 2 Parson Cont. (8th ed.) 561; 1 Beach Cont., sections 72, 73 and authorities there cited. *Rue v. Rue*, 21 N. J. Law 369-377.

It is insisted by the learned counsel for the appellant that the contract sued on here is no more uncertain than was the contract in *Child v. Swain*, *supra*; which it is asserted this court enforced. But there is not a word from the beginning to the end of the report of that case to indicate whether the contract was certain or uncertain. No question was made

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*Thompson et al. v. Board of Com'rs of Jasper County et al.*

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or decided in the case as to the certainty or uncertainty of the contract. The court finds simply that the contract, a copy of which is filed with the complaint, was entered into without setting it out or stating its provisions.

But we need not and do not determine whether the contract sued on here was void for uncertainty as the other objections above mentioned to the second paragraph are fatal. The circuit court did not err in sustaining the demurrer to either paragraph of the complaint.

Judgment affirmed.

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THOMPSON ET AL. *v.* THE BOARD OF COMMISSIONERS  
OF JASPER COUNTY ET AL.

[No. 17,690. Filed Dec. 2, 1896. Rehearing denied May 25, 1897.]

**DRAINS.**—*Report of Reviewers.*—*Dismissal of Petition.*—*Costs.*—*Statute Construed.*—Section 5694, Burns' R. S. 1894, of the drainage law, providing for a hearing of the second report of the viewers by the board of county commissioners, authorizes such board to hear and determine the report of the apportionment according to the evidence, and if the evidence shows that the costs exceed the benefits they are not bound to confirm the report, but are required to dismiss the petition and proceedings at the cost of the petitioners. *p. 141.*

**SAME.**—*Appeal.*—*Statute Construed.*—In an appeal to the circuit court, under section 5695, Burns' R. S. 1894, from the action of the board of county commissioners in dismissing a drainage petition only matters specified in said section can be assigned as error. *pp. 141-144.*

From the Jasper Circuit Court. *Affirmed.*

*S. P. Thompson, M. F. Chilcote, McConnell & Jenkins, Nelson & Meyers, W. B. Austin, and Foltz, Spitler & Kurrie,* for appellants.

*Stuart Bros. & Hammond, E. B. Sellers W. E. Uhl and R. W. Marshall,* for appellees.

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*Thompson et al. v. Board of Com'rs of Jasper County et al.*

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MCCABE, J.—This is an appeal to this court from the judgment of the Jasper Circuit Court dismissing an appeal from a decision of the board of commissioners of Jasper county made March 23, 1895, dismissing certain proceedings therein pending for the construction of a public ditch.

Those proceedings were commenced by petition of the appellants on October 7, 1892, under the act approved March 7, 1891, sections 5690-5717, Burns' R. S. 1894. In addition to the appeal by the present appellants (being a part of the petitioners for the ditch), certain remonstrators and exceptors to apportionments of benefits and costs of construction also appealed from the action of the board on their exceptions.

The circuit court at first overruled motions to dismiss both appeals, but afterwards set aside its action in overruling such motions to dismiss appeals and permitted an amended motion by the appellees here to dismiss the petitioner's appeal, and sustained that motion, and the exceptors and remonstrators dismissed their appeal from the board to the circuit court by the consent of said court.

The errors assigned here call in question the action of the circuit court in rescinding its first order as to dismissal of appeals, in sustaining the motion to dismiss the appeal of the petitioners from the board to the circuit court, in overruling appellant's motion to modify the judgment of dismissal so as to relieve petitioners of the costs, and holding that there was no right of appeal from the board to the circuit court.

The act under which these proceedings took place is very peculiar. The ditch must be not less than five miles in length. The application or petition must be to the board of commissioners of the county, signed by at least ten owners of lots or lands drained or bene-

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fited thereby. They must give bond conditioned for the payment of all costs "if the prayer of the petitioners be not granted or be dismissed for any cause by the board of commissioners." Sections 5690, 5691, *supra*. At the next regular or special session of the board after the filing of such petition the board is required to appoint three viewers, one of whom must be a competent surveyor or engineer, who are required to proceed to view the line of the proposed improvement, and report whether such improvement is necessary or conducive to public health, convenience, or welfare, and report the best route, and their finding, in writing, to the board of commissioners at a time to be fixed by them, when they shall order the auditor to enter the same upon the record. If the board find against the improvement they are required to dismiss the petition and proceedings at the costs of the petitioners. If they find in favor of making the improvement, they are required to direct said viewers, with the surveyor or engineer, to go upon the line of the route, and among other things, to make and return a schedule of all lots, lands, and public or corporate roads that will be benefited or damaged by the improvement, and apportion costs in proportion to benefits or damages which will result to each lot or parcel of land. Upon the filing of this report the auditor is required to issue notice to the landowners affected by the improvement.

If the board find that the notices have been served on the landowners affected, they are required to "examine the report of the viewers and appointment [apportionment] by them made, and if it is fair and just according to benefits, they shall approve and confirm the same. If, however, the board of commissioners find that the apportionment reported by the viewers is unfair and unjust, and ought not to be confirmed,

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they shall so order and amend it upon the evidence, so as to make it fair and just in proportion to benefits,—and if necessary, in their opinion, they may adjourn the further hearing, not exceeding twenty days, to a day to be fixed by them, and go upon the premises and by actual view apportion the benefits, damages, cost of location and construction, or any part thereof, as to them may seem just and proper under the evidence, and on the day so fixed by them they shall again meet at the auditor's office, or usual place of meeting, and determine the said apportionment and spread the same on the record." Section 5694, *supra*.

The 18th section of the act provides that: "No assessments shall be made of benefits to any lands upon any principle other than that of such benefits derived." Section 5707, Burns' R. S. 1894. It is thus made clear that assessments against lands for the cost of such improvement under said act cannot exceed benefits.

The record shows that the board, on the preliminary or first report of the viewers, and before notice could be or was given to the landowners affected, found in favor of making the improvement. It also shows that on the coming in of the second report of the viewers making the assessment of benefits and apportioning costs of construction to the various lands affected, and after service of notice on the owners of lands affected, there was a hearing on the same, as required by the section above quoted, and also a hearing of exceptions to apportionments by some of the landowners affected, as required by the next section, at the same time, had resulted in overruling all of such exceptions.

Thereupon the board made the following order: "The board, after hearing further evidence upon the benefits and damages, finds that the estimated cost of

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construction will exceed the benefits, and the board orders that the proceedings and petition be dismissed at the costs of the petitioners," etc.

From this order the appeal to the circuit court was prosecuted. It is contended by the learned counsel for appellants that the order of the board dismissing the petition and proceedings was void, because, as it is claimed, the board had already found on the incoming of the first or preliminary report of the viewers in favor of making the improvement, and that their subsequent order amounted to a revocation of their first order and all other previous orders, and cite to the point that the board had no power to so revoke previous orders. *Doctor v. Hartman*, 74 Ind. 221; *Weir v. State*, 96 Ind. 311; *Board, etc., v. Logansport, etc., Gravel Road Co.*, 88 Ind. 199. That is a correct statement of the law where the proceedings containing the order or act attempted to be revoked have ended before the attempted revocation was made. But it has been held by this court that previous orders of the board may be revoked by them or set aside while the proceedings in which it occurs is still pending and undetermined. *Scott v. Board, etc.*, 101 Ind. 42. But it is not clear from this statute that the board was authorized even to make a finding in favor of making the improvement on the preliminary report of the viewers and before the adverse parties could be served with notice or get into court. Indeed, one of the grounds on which appellees insist that the action of the board in dismissing the petition and proceedings are justified is that the whole act is so vague and meager in its provisions that it is inoperative.

It is insisted with some show of reason that the act nowhere provides for making a final order establishing or directing that the improvement be made. It makes no provision for anyone to oversee or super-

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intend the construction of the work. No one is authorized to determine whether the work is done according to contract, or to accept the same. Though money to construct the work is to be raised by the sale of bonds by the county treasurer, no authority is granted or manner provided for paying out the money.

We shall not find it necessary to decide, and we do not decide, what effect these omissions have on the operation of the act.

One thing is certain, and that is that the 5th section of the act authorizes a hearing on the second report of the viewers, and if they find that the apportionment reported by the viewers is unfair and unjust and ought not to be confirmed, they are required so to order; and they are required to amend it upon the evidence, so as to make it fair and just according to benefits, and determine the said apportionment and spread the same on record.

This authorizes them to hear and determine the report of the apportionment according to the evidence. If that evidence shows, as the board said by their decision, that the costs exceeded the benefits, they were not bound to confirm the apportionment. On the contrary, they were required to dismiss the petition and proceedings at the petitioners' costs, as they did. The appellants do not claim that the determination of the question by the board was contrary to or not justified by the evidence, and by their appeal do not seek to correct any error of fact by a trial of the case *de novo*, but simply affirm that the board erred in deciding the question of excess of costs over benefits at that time.

But even if the board erred in dismissing the proceedings and petition, the circuit court was justified in dismissing the appeal to it from said order.

The 6th section of the act, among other things, pro-

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vides that "Any person or corporation aggrieved by the decision may appeal from the order of the board of commissioners, and on such appeal may determine either of the following matters: First. Whether said ditch will be conducive to public health, convenience, or welfare. Second. Whether the route is practicable. Third. Whether the compensation has been allowed for property appropriated. Fourth. Whether proper damages have been allowed for property affected by the improvement. The appellant shall pray an appeal and file a motion, in writing, specifying therein the matters appealed from, which motion shall be filed and recorded."

The appeal was attempted to be taken under these provisions of the act. Accordingly, the petitioners, appellants, prayed an appeal from the board to the circuit court from the order in question, and filed their motion therefor in writing, specifying the matters appealed from. Said motion, after stating the history of the case up to that point, specified the matters appealed from as follows: "Whereupon the petitioners appeal and assign for error: (1) That the board, after directing the improvement to be made, erred in taking up for decision the question as to whether the ditch was of public utility touching the relation of the total benefits to the total cost; (2) the board erred in taking up of its own motion, on May 10, 1894, the questions as to the practicability of any portion or the whole route; (3) the board erred in deciding to dismiss the petition and proceeding without an issue thereon, and after a large amount of costs had accrued, since the same question came up before the board on April 12, 1893, and was by the board decided the other way; (4) the board's judgment for costs was without jurisdiction and is appealed from on these grounds."

It will be seen that none of these specifications hint



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at any one of the matters authorized by the statute to be determined on appeal, unless it be the second, and that simply charges the commissioners with erring in taking up on its own motion, on May 10, 1894, the questions as to the practicability of any portion or the whole route. That is far from a specification to try the question "whether the route is practicable," as authorized by the statute. But the record shows that the board did not decide the practicability of the route against the petitioners, the appellants, but in their favor; and it further shows that the only question the board decided against the petitioners was whether the costs of construction of the work would exceed the benefits therefrom derived to the lands affected, and whether, under such circumstances, the proceedings and petition ought to be dismissed at the petitioners' costs. These decisions are the only ones complained of as affording ground for an appeal from the board to the circuit court on behalf of the petitioners, appellants, in their brief in this court. It will be readily seen from the statute quoted that no such matters or questions are authorized by the act to be tried on appeal.

It was said by this court in *Denton v. Thompson*, 136 Ind. 446, of similar provisions in the ditch law of 1881, that only the questions therein specified could be tried on appeal under that law.

This rule is analogous to that prevailing in highway cases. In such cases it has been held that if the report of the first viewers is against the public utility of the road, that their decision of that question is made final by the statute. *McKee v. Gould*, 108 Ind. 107. And so, too, it has been held that the report of reviewers, on remonstrance that the proposed highway is not of public utility, cannot be appealed from for the same reason. *Jones v. Duffy*, 119 Ind. 440.

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And so the statute here involved, providing as it does for an appeal, naming certain matters which may be determined on such appeal, and requiring the appeal to be taken by written motion, specifying therein the matters appealed from, clearly indicates that it was the purpose and intent of the act to make the action of the board final on all matters or questions not embraced in the specifications of the statute above quoted. The decision that the estimated cost of the contemplated improvement exceeds the benefits resulting to the lands, and the dismissal of the petition and proceedings at the cost of the petitioners in consequence thereof, are not embraced in the specifications of the statute in matters that might be determined on such appeal, and hence the action of the board thereon was final and could not be appealed from.

The act of awarding the costs against the petitioners on the dismissal of the petition and proceedings by the board does not serve to bring the appeal within the matters specified in the statute, even if the board erred in taxing the costs against the petitioners. But there was no error in so taxing the costs against the petitioners by the board on the dismissal of the petition and proceedings, because the statute expressly requires that such dismissal should be at the costs of the petitioners.

The only thing the circuit court could correctly do was to dismiss the appeal. The fact that it at one time erroneously overruled the motion to dismiss such appeal did not irrevocably commit the court to such error. It had a right to rectify the error at any time before the final determination of the proceedings, which it did.

The judgment is affirmed.

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 Head *et al.* v. Doehleman.
 

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## HEAD ET AL. v. DOEHLEMAN.

[No. 18,209. Filed March 16, 1897. Rehearing denied May 25, 1897.]

**APPEAL AND ERROR.**—*Demurrer not in Record.*—Where a demurrer does not appear in the record, no question affecting the pleading to which the demurrer was addressed can be considered on appeal. *p. 146.*

**INTOXICATING LIQUORS.**—*Remonstrance.*—*Sufficiency Of.*—Under section 9, of the act of March 11, 1895, providing for a remonstrance against the granting of a license, by the board of county commissioners, to an applicant for the sale of intoxicating liquors, it is not necessary that it be set forth in the body of the remonstrance that the remonstrators are legal voters, and constitute a majority of the legal voters of the township or ward as determined by the number of votes cast at the last preceding election. *pp. 146-148.*

**SAME.**—*Remonstrance.*—*Pleading.*—Since the only pleading authorized on behalf of the remonstrators against the granting of a license to sell intoxicating liquors is a remonstrance which must be filed with the board of county commissioners, it is not error to sustain a demurrer to an answer filed by the remonstrators after the case has been appealed to the circuit court. *pp. 148, 149.*

**BOARD OF COUNTY COMMISSIONERS.**—*Appeal From.*—Appeals from a board of county commissioners to the circuit court stand for trial *de novo*, and suspend all proceedings had upon the questions in issue before the commissioners, which proceedings cannot be taken into consideration upon the trial in the circuit court. *p. 149.*

From the Boone Circuit Court. *Affirmed.*

*Jesse Smith, J. A. Abbott and B. F. Ratcliff, for appellants.*

**MCCABE, J.**—The appellee applied to the board of commissioners of Boone county for a license to sell intoxicating liquors in a less quantity than a quart at a time, at their September term for 1895. The appellants were remonstrators. The board refused to grant the license because the remonstrators constituted a

148	145
150	377
152	556

148	145
154	123
155	17
156	650
156	16
156	500

148	145
157	307

148	145
167	30
168	563

148	145
169	615

148	145
171	61

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majority of the legal voters of the township, and the applicant appealed to the circuit court, wherein a trial resulted in a finding in favor of applicant, whereon a judgment was rendered granting the appellee a license.

The first question sought to be presented by the assignment of error in appellants' brief is upon the action of the circuit court in sustaining the appellee's demurrer to the appellants' remonstrance. The demurrer, however, is not in the record, and therefore we cannot know, only from the statement of counsel, what one of the six grounds of demurrer it assigned, or what question it raised. Under such circumstances it has been adjudged by this court that no question affecting the complaint or other pleading to which the demurrer is addressed can arise upon such ruling. *Sharpe v. Dillman*, 77 Ind. 280; *Aydelott v. Collings*, 144 Ind. 602.

The next question thus presented is predicated on the action of the circuit court in overruling appellants' motion asking leave to amend their remonstrance "so as to show and allege that the remonstrators were legal voters of Eagle township, Boone county, Indiana, and that they constitute a majority of the legal voters of said township as determined by the number of votes cast at the last preceding election in said township for the highest office voted for at said election." The remonstrance as filed before the board of commissioners read thus: "We the undersigned residents and voters of Eagle township, Boone county, Indiana, do hereby remonstrate against the granting of license to George Doehleman to sell intoxicating, spirituous, vinous or malt liquors in less quantities than a quart at a time with the privilege of allowing the same to be drank on the premises in said township." This remonstrance was filed under the 9th section of

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the act approved March 11, 1895, commonly called the "Nicholson Law." That section provides that: "If, three days before any regular session of the board of commissioners of any county a remonstrance in writing, signed by a majority of the legal voters of any township, etc., \* \* \* shall be filed with the auditor of the county against the granting of a license to any applicant for the sale, etc., \* \* \* it shall be unlawful thereafter for such board of commissioners to grant such license," etc. Acts 1895, p. 251.

This section does not prescribe what the form or language of the remonstrance shall be, nor what its allegations shall be. It does require that the remonstrance shall be against the granting of the license, and that it shall be signed by a majority of the legal voters of the township or ward. But it does not require the body of the remonstrance to state that fact, or that they are legal voters of the township or ward. A petition for the establishment of a highway must, in order to confer jurisdiction on the board of commissioners under the statute, be signed at least by twelve freeholders of the county. But that fact, that is, that they are freeholders and residents of the county, need not be stated in the petition. *Little v. Thompson*, 24 Ind. 146. In the very nature of things such a statement in the remonstrance was never contemplated, because, no remonstrator, when called on to sign such a remonstrance, can know that when his name is signed it contains the names of a majority of the legal voters of the township or ward. Besides, it has been held by this court that the remonstrance may be on separate papers, each one of which may be signed by different remonstrators, and when they are all filed may be treated as one remonstrance. *Wilson v. Mathis*, 145 Ind. 493.

Certainly it never was contemplated that each re-

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monstrator should know that himself and those on the paper at the time he signs it constitute a majority of the legal voters of the township or ward, and hence the statute does not require him to sign a statement the truth of which he knows nothing about. But doubtless the statute contemplates proof of that fact, just as in highway petitions. And likewise proof must be made that each person signing the remonstrance is a legal voter of the township or ward. It is not necessary that we decide whether the remonstrance in this case should have stated that the signers thereof were all legal voters of the township or not. It would seem that that was not contemplated by the statute as a matter of pleading, because that would require that each signer should state, over his signature, that all the other signers were legal voters of the township or ward, whereas he may not know whether they are or not, or he may not know who is to sign after him. But here it is stated in the remonstrance that the remonstrators are all residents of the township, and voters. If the statute even contemplates that it should be stated that they were legal voters of the township or ward, the statement in the remonstrance is sufficient to comply with the rules of pleading before the board of commissioners. The fact that the remonstrators are all legal voters of the township is fairly implied from the statement in the remonstrance. The same degree of strictness in pleading is not required in courts of county commissioners as in courts of general superior jurisdiction. *Board, etc., v. Adams*, 76 Ind. 504; *Board, etc., v. Hon*, 87 Ind. 356; *Board, etc., v. Ritter*, 90 Ind. 362; *Duncan v. Board, etc.*, 101 Ind. 403, 404. We therefore hold that the remonstrance was sufficient, and that there was no error in refusing leave to amend it.

The next error complained of is predicated on the

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action of the circuit court in sustaining appellee's demurrer to appellants' plea or answer filed in the circuit court. Such alleged error is wholly unavailable for many reasons. First. The only pleading authorized in such a case is a remonstrance on account of immorality or other unfitness as provided in the original liquor law of 1875, section 7278, Burns' R. S. 1894 (5314, R. S. 1881), or, on account of a majority of the legal voters of the township being opposed to the granting of such license as provided by the "Nicholson Law." And such pleading or remonstrance must be filed in the commissioners' court, and cannot be filed for the first time in the circuit court on appeal, though it may be amended on such appeal. *Ex parte Miller*, 98 Ind. 451, 452; *Miller v. Wade*, 58 Ind. 91; *List v. Padgett*, 96 Ind. 126; *Fletcher v. Crist*, 139 Ind. 121-124. Second. The alleged plea or answer simply set up and plead the proceedings and judgment of the board of commissioners in refusing the appellee's license as a reason why the circuit court on appeal could not grant such license, and wound up with a prayer that the appeal to the circuit court be dismissed.

Appeals from the board of commissioners to the circuit court stand for trial *de novo* in that court. Such appeals suspend all the proceedings had upon questions in issue before the commissioners, and they can not either be used or taken into consideration upon the trial in the circuit court. *Corey v. Swagger*, 74 Ind. 211; *Grimwood v. Macke*, 79 Ind. 100; *Cox v. Lindley*, 80 Ind. 327; *Coolman v. Fleming*, 82 Ind. 117; *Green v. Elliott*, 86 Ind. 53; *Irwin v. Lowe*, 89 Ind. 540; *Meehan v. Wiles*, 93 Ind. 52; *Denny v. Bush*, 95 Ind. 315; *Burns v. Simmons*, 101 Ind. 557; *Freshour v. Logansport Turnpike, etc., Co.*, 104 Ind. 463; *Reynolds v. Shults*, 106 Ind. 291; *Black v. Thomson*,

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107 Ind. 162; *Hardy v. McKinney*, 107 Ind. 364; *Ford v. Ford*, 110 Ind. 89; *Hight v. Claman, Treas.*, 121 Ind. 447; *Stipp v. Claman, Treas.*, 123 Ind. 532; *Sharp v. Malia*, 124 Ind. 407; *Mills v. Hardy*, 128 Ind. 311; *Bachelor v. Cole*, 132 Ind. 143.

Therefore, there was no error in sustaining the demurrer to the plea or answer.

The other errors assigned that the court erred in rendering judgment on demurrer in favor of appellee, and against appellants, and in overruling appellants' motion for a new trial, are waived by appellants' failure to discuss them in their brief. We have not been favored with a brief on behalf of the appellee.

Judgment affirmed.

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SCHMIDT, TREASURER, ET AL. v. FAILEY, RECEIVER OF  
THE SUPREME SITTING OF THE ORDER  
OF THE IRON HALL.

[No. 18,084. Filed June 8, 1897.]

148 150  
149 383  
148 150  
164 48

**TAXATION.**—*Funds of Nonresidents in the Hands of a Receiver in This State.*—The funds of an insolvent mutual benefit assessment society in the hands of a receiver in this State are subject to taxation in the county where they are kept on deposit by such receiver, although the funds had been collected in other states in which the company also did business, and turned over to the Indiana receiver by orders of their respective courts, and were to be distributed to claimants, many of whom were nonresidents.

From the Marion Superior Court. *Reversed.*

*W. A. Ketcham, Merrill Moores and A. R. Hovey,*  
for appellants.

*Harold Taylor and Baker & Daniels,* for appellee.

HOWARD, J.—The Supreme Sitting of the Iron Hall is a mutual benefit and assessment society, organized



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under the voluntary association laws of the State of Indiana, and having its principal office in the city of Indianapolis, but doing business without, as well as within the limits of the State. The association having become insolvent, the appellee was appointed receiver and took charge of its assets. *Supreme Sitting of the Iron Hall v. Baker*, 134 Ind. 293.

This action was brought by the receiver to enjoin the appellants, who are the treasurer and auditor of Marion county, from taking any steps for the collection of taxes, amounting to \$8,626.96, assessed against certain moneys held on deposit by said receiver, in banks in the city of Indianapolis, to the amount of \$522,847.28.

The assessment was made by the county board of review; and it was alleged in the complaint for injunction that such assessment was illegal and void, for the reason, "That said county board of review did not have jurisdiction of and power to assess the moneys so on deposit in bank to the credit of this plaintiff as receiver."

It appears from the complaint that other receivers had been appointed for said corporation in the different states where it had done business, but that such receivers outside of Indiana, by direction of the courts appointing them, had turned over to this appellee the funds in their hands, with the understanding and agreement that all holders of certificates of membership in said organization should be paid, ratably, their several shares of the balance of funds left in the hands of the receiver after collection of amounts due to and payment of expenses incurred by him in the administration of his trust. The claimants for such balances are, in number, about 45,000, and are scattered over the country. The amounts found due them aggregate \$4,815,174.40.

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The contention of appellee is, that it is those claimants, and not the receiver, that are the owners of the fund to be distributed by him in part payment of their claims; and, hence, that it is the claimants severally, and not the receiver, that should be taxed for the funds in his hands.

The constitution of this State requires that all property, except that used for certain designated purposes, should be taxed. Article 10, section 1, declares, that "The General Assembly shall provide, by law, for a uniform and equal rate of assessment and taxation; and shall prescribe such regulations as shall secure a just valuation for taxation of all property, both real and personal, excepting such only, for municipal, educational, literary, scientific, religious or charitable purposes, as may be especially exempted by law."

In carrying out this constitutional requirement, the legislature, in section 3 of the tax law, section 8410, Burns' R. S. 1894, has provided, that "All property within the jurisdiction of this State, not expressly exempted, shall be subject to taxation."

It is not denied that the property in question, that is, "moneys so on deposit in bank to the credit of this plaintiff as receiver," is property, "personal property," as understood in the tax law. In section 53 of that act, as amended February 23, 1895 (Acts 1895, p. 21), the first item named in the schedule of "personal property—chattels," is "money on hand or on deposit, or subject to my order, check or draft," etc. Neither is it contended that, under the constitution, such property has been, or can be, exempted from taxation.

The simple question left, then, is, whether the property in the hands of the receiver is "within the jurisdiction of this State." That it is in the hands of a receiver, in this State, and subject to distribution by

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him, on order of the court of which he is an officer, would seem to make it clear that it must be within the jurisdiction of the State.

Even if the receiver were not technically the "owner" of the property for many purposes, including the purpose of taxation, still that circumstance would not be controlling. In section 169 of the tax law, section 8587, Burns' R. S. 1894, it is provided, that "It shall be the duty of every administrator, executor, guardian, receiver, trustee, or person having the property of any decedent, infant, idiot or insane person in charge, to pay the taxes due upon the property of such decedent, ward or party." If, then, appellee is in charge of the property of the corporation, as he certainly is, under direction of the court, he is required, under this section, "to pay the taxes due upon the property" so in his charge.

And the fact, too, that nonresidents might have claim to some distributive share of the property, on final settlement, whether that property were in the hands of an administrator, a receiver or other trustee, could not deprive the State of the right to tax the property before distribution, and while still in custody of an official of the court having control of such distribution. By clause 4, section 11, of the tax law, as amended by the act approved and in force March 1, 1895 (Acts 1895, p. 74), it is provided, that "Personal property of nonresidents of the State shall be assessed to the owner or to the person having control thereof in the township, town or city where the same may be, except that where such property is in transit to some other place within the State, it shall be assessed in such place." Appellee, even if he were not, in law, the owner of the "moneys so on deposit in bank" to his credit as receiver, was, at least, "the person having control thereof," and hence the one to whom such

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property should be assessed. As well might an administrator claim that he ought not to be required to pay taxes on the money in his hands belonging to the estate of his decedent, for the reason that certain heirs or creditors residing in other states or in other counties would have a right to share in the distribution of such estate on final settlement.

Indeed, if there is any property, whether held in trust or not, which should aid in the support of the government within whose jurisdiction it is located, certainly it must be that property which is in need of the care and assistance of the courts and officials of the State, to protect it while here, and to secure, on final settlement, its fair and just distribution to its ultimate owners wherever they may reside. The receiver himself and the counsel who aid him in his trust, do not act without compensation; still less should the State be called upon to expend her revenues in the management of the same trust without proper return for her outlay. Taxes are not only a lien upon trust funds in court, but they are the first and paramount lien, to be paid before any other lien or claim whatsoever, except it be the costs of court.

There can be, as said in *Hoyt v. Commissioners of Taxes*, 23 N. Y. 224: "No more just and appropriate exercise of the sovereignty of a state or nation over property, situated within it and protected by its laws, than to compel it to contribute towards the maintenance of government and law."

And it was well said in *Billinghurst v. Spink County*, 5 S. D. 84, 58 N. W. 272, that "A nonresident who sends money into this state and surrenders its possession and control to agents fully authorized to loan, invest, and manage the same, thereby subjects such property to the jurisdiction of this state, for the purposes of taxation; and the fiction as to the situs of the

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property yields to the requirements of justice, and the actual situs is the place where the property is actually situated." Citing 1 Desty. Tax'n, 324; *Hutchinson v. Board, etc.*, 66 Iowa 35, 23 N. W. 249; *McCutchen v. Rice County*, 7 Fed. 558; *Cooley Tax'n*, 373; *Curtis v. Ward*, 58 Mo. 295; *Walton v. Westwood*, 73 Ill. 125; *In re Jefferson*, 35 Minn. 215, 28 N. W. 256.

A like doctrine as to situs of personal property was announced by Judge Storey, in his Conflict of Laws, section 550, where it is said: "Although movables are for many purposes to be deemed to have no situs, except that of the domicile of the owner, yet this being but a legal fiction, it yields whenever it is necessary for the purpose of justice that the actual situs of the thing should be examined. A nation within whose territory any personal property is actually situate has as entire dominion over it while therein, in point of sovereignty and jurisdiction, as it has over immovable property situate there."

"There is no prerogative of sovereignty," said Justice Blachford, in *Stevens v. New York, etc., R. R. Co.*, 23 Fed. Cas. 21, 13 Blach. 104, "which is of higher importance than the power of taxation, which includes the collection as well as the assessing of the taxes. The very existence of the state as a government depends upon the exercise of such power. Except under very special circumstances, such power ought not to be interfered with by injunction." And he adds: "There is no sound principle upon which the property of a person or a corporation, which is placed in the hands of a receiver by a court of justice, for the purposes of a suit pending in such court, can be regarded as being thereby rendered exempt from the operation of the tax laws of the government within whose jurisdiction such property is situated."

In *Walters v. Western, etc., R. R. Co.*, 68 Fed. 1002,

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the court said: "This property, if it is subject to taxation at all, must be taxed as a lump sum in the hands of the receivers. \* \* \* It is, to a large extent, actual money, as alleged, held by the receivers in the state, county, and city claiming the tax. It is not different from any other property in the hands of receivers of court, which all the authorities agree is subject to taxation in the locality where it is held by these officers of court."

And in *New Jersey, etc., R. R. Co. v. Board of Railroad Comr's*, 41 N. J. L. 235, it was said: "The appointment of a receiver, as the means of protecting the private rights of individuals, cannot affect the rights of the state. The state is still sovereign. Its sovereignty can only be secured by maintaining its powers of taxation, and there is neither any sound principle nor authority upon which the property of a person, or a corporation, which is placed in the hands of a receiver for the purposes of a litigation, can be regarded as thereby rendered exempt from the operation of the tax laws of the government within whose jurisdiction such property is situated."

"The general statutes," it was said in *Spalding v. Commonwealth*, 88 Ky. 135, 10 S. W. 420, and the same is true of our own statutes, "show it was intended that all property should contribute its proper proportion to the means necessary to support the county and state governments. They were enacted in the spirit of fairness and equality; and property situated like that in question will escape, and receiverships become exceedingly popular, unless the court in control of it can order its officer holding it to list it and pay the taxes upon it. \* \* \* The estate should pay its proportion of the public burden in return for its protection under the law."

So it was said in *George v. St. Louis, etc., R. W. Co.*,

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44 Fed. 117: "Inasmuch as the receiver appointed in this case had possession of the property on account of which the tax was imposed during the period within which the collector might have made, and probably would have made, a levy but for the existence of the receivership, it is plainly the duty of the court to see that the tax bill against personalty is paid in preference to all other demands. The appointment of a receiver and sale of property by a decree of this court, in a case of this character, will not be allowed to interfere with or to defeat the collection of a public revenue."

Judge Brewer, now of the Supreme Court of the United States, in *Central Trust Co. v. Wabash, etc., R. W. Co.*, 26 Fed. 11, said: "I think that in levying and collecting taxes the state is exercising its sovereign power, and that there should be no interference with its collection of those taxes in its prescribed and regular methods, even by a court having property in the possession of its receivers, unless it is first charged that the taxes are in some way illegal or excessive."

And in *Ex parte Chamberlain*, 55 Fed. 704, the court said: "There can be no doubt that property in the hands of a receiver of any court, either of a state or of the United States, is as much bound for the payment of taxes, state, county, and municipal, as any other property. Persons cannot, by coming into this court, and, for the promotion of their interests, applying for and obtaining the appointment of receivers, obtain exemption from the paramount duty of a citizen." See *Dysart v. Brown* (Ga.), 26 S. E. 767; *Senour v. Ruth*, 140 Ind. 318; *Buck v. Miller, Treas.*, 147 Ind. 586, 37 L. R. A. 384; *United States v. Erie R. W. Co.*, 106 U. S. 327. See, also, collection of authorities in *Schmidt v. Failey, Rec.*, 37 L. R. A. 442.

Neither upon principle, then, nor upon authority, as

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we think, can it be contended that the appellee should not be required to pay the taxes assessed against the moneys in his charge and control, whether on hand or on deposit, as well as against all other property in his hands as receiver.

The judgment is reversed, with instructions to sustain the demurrers to the complaint, and for further proceedings not inconsistent with this opinion.

## KOERNER v. STATE, EX REL. JUDY.

[No. 18,076. Filed June 8, 1897.]

**OFFICERS.—School Trustees.—Failure to File Bond.—Vacancy.—Statute Construed.**—Under the provision of article 15, section 8, of the constitution, that officers who are elected for a term are thereby authorized to continue to discharge the duties of the office until a successor is elected and duly qualified, a school trustee who is elected as his own successor, and who, before entering upon the discharge of his duties as such officer, took the oath of office, as provided by section 5915, Burns' R. S. 1894, and upon the organization of the school board was elected president of such board, does not vacate the office of school trustee by failure to file his bond as such president within ten days after the commencement of his term of office, as provided by section 7542, Burns' R. S. 1894 (5527, R. S. 1881).

From the Dubois Circuit Court. *Affirmed.*

*John L. Bretz, John E. McFall and Bruno Buettner,* for appellant.

*Richard M. Milburn, Michael A. Sweeney and William E. Cox,* for appellee.

**MCCABE, C. J.**—The appellee applied for an alternative writ of mandate against the appellant as auditor of Dubois county, requiring him to show cause why he did not approve and accept the official bond tendered by the relator as treasurer of the school board of the town of Jasper.

148	158
150	696
151	559
148	158
154	399
148	158
167	20
167.	21



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The alternative writ issued and the appellant made his return thereto, or answer, to which the appellee demurred for want of sufficient facts, and the court sustained the demurrer, and upon the hearing the court ordered and adjudged that a peremptory writ of mandate issue overruling appellant's motion for a new trial.

The errors assigned call in question the rulings above mentioned.

The statute provides that: "The common council of each city and the board of trustees of each incorporated town of this State shall, at their first regular meeting in the month of June, elect three school trustees (who shall hold their office one, two and three years respectively, as said trustees shall determine by lot at the time of their organization), and, annually thereafter, shall elect one school trustee, who shall hold his office for three years. Said trustees shall constitute the school board of the city or town; and, before entering upon the duties of their office, shall take an oath faithfully to discharge the duties of the same. They shall meet within five days after their election, and organize by electing one of their number as president, one as secretary, and one as treasurer. The treasurer, before entering upon the duties of his office, shall execute a bond, to the acceptance of the county auditor, conditioned as in ordinary official bonds, with at least two sufficient freehold sureties, who shall not be members of said board, in a sum not less than double the amount of money which may come into his hands, within any one year, by virtue of his office. The president and secretary shall each give bond, with like sureties, to be approved by the county auditor, in any sum not less than one-third of the treasurer's bond. All vacancies that may occur in said board of school trustees shall

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be filled by the common council of the city or board of trustees of the town; but such election to fill a vacancy shall only be for the unexpired term. The board of school trustees shall, each year, within five days after the annual election of a member, reorganize their board and execute their respective bonds for the ensuing year." Section 5915, Burns' R. S. 1894 (4439, R. S. 1881).

The application for and return to the writ set forth in substance that the relator, John F. Judy, on June 11, 1894, was duly elected by the board of trustees of the town of Jasper, Indiana, a member of the board of school trustees of said town for a term of three years; that afterwards, at the meeting of said school board for reorganization on June 12, 1894, he was by said school board elected president thereof, and he thereupon gave bond and qualified as such; that afterwards, on June 12, 1895, at the reorganization of such school board he was duly elected president thereof, and he thereupon gave bond and qualified, and each time entered upon the discharge of the duties of the office of president of said school board; that afterwards, on June 9, 1896, at the reorganization of said school board he was re-elected by said school board president thereof. And on June 24, 1896, he entered into bond in the sum of \$2,000.00, with three sufficient freehold sureties conditioned according to law, which he then tendered to the respondent as such auditor, together with \$1.00 as fee for filing, approving and recording the same, and asked that the same be accepted and approved by said auditor; that said auditor refused to accept or approve said bond, a copy of which is set forth; that on June 26, 1896, relator took the oath of office to faithfully discharge the duties of said office of president of said school board; that at the time said relator was so elected a member of said

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school board, and president thereof, and at each time he so tendered his bond, he had been a *bona fide* resident and elector of said town two years, and still is such resident and elector, and fully qualified to hold said office of member of said school board and president thereof; that relator did not receive his certificate of election as president of said school board from said board until June 29, 1896; that the board of town trustees of said town, on June 8, 1896, at a regular meeting thereof, elected Frank Joseph as a member of the school board of said town as his own successor, his previous term having then expired; that on June 9, 1896, at the reorganization of said school board, said Frank Joseph was duly elected treasurer of said school board, and on June 10, 1896, he executed his official bond as such treasurer in the penalty of \$10,500.00, payable to the State of Indiana, conditioned according to law; that such penalty is more than double the amount which would come into his hands as such treasurer during the term of said office, as fixed by the statute; that on July 6, 1896, said relator entered into a bond, payable to the State of Indiana, in the penal sum of \$3,500.00, with three sufficient freehold sureties thereon, conditioned that he would faithfully perform the duties of said office of president of said school board according to law; that the relator, on July 7, 1896, tendered said bond, together with \$1.00 as fee for filing, approving and recording the same, to the respondent as auditor of said county, and asked that the same be accepted and approved by said auditor, and offered to make proof of the sufficiency of the sureties thereon; that said auditor then and there, without any excuse, refused to accept or approve said bond; that in fact the sureties were resident freeholders of the town and more than suffi-

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cient; that a copy of the bond is set forth; that said school board had not declared said office of president thereof vacant when said last bond was tendered; nor has said school board yet declared said office of president of said school board vacant.

The answer and return to the alternative writ by the appellant was first a denial of each allegation in the alternative writ and the affidavit and petition therefor, and second, in addition to the facts set forth above, stated that the appellant as such auditor having been duly notified of the re-election of Frank Joseph as treasurer of said school board on June 10, 1896, fixed the penalty of his bond at \$10,500.00, that sum being not less than double the amount of money which might come into the hands of such treasurer within one year by virtue of his office; and said Joseph presented his bond with the necessary sureties in such penalty conditioned according to law, duly acknowledged, which was duly accepted and approved by appellant as such auditor on said day; that said Frank Joseph took and subscribed the proper oath of office as such treasurer on said day, and such bond and oath were filed and recorded in said auditor's office on said day; that appellant on June 23, 1896, duly reported to the superintendent of public instruction the name and postoffice address of said Frank Joseph as school trustee and treasurer of the school board of said town; that at a special meeting of the board of trustees of said town held on Monday, June 22, 1896, for the purpose of electing two school trustees for said town to fill vacancies in offices of school trustees for said town, John A. Sermersheim was duly elected a school trustee of said town as successor in office of the relator John F. Judy, of which election appellant, as such auditor, was duly notified; that afterwards, on June 23, 1896, at a meeting of the board of school trustees of

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said town for the purpose of renewing and completing the reorganization of said school board, said John A. Sermersheim, a member of said board was duly elected president of said school board, of which election appellant, as such auditor, was duly notified; that afterwards on the same day appellant, as such auditor, fixed the penalty of his official bond at \$3,500.00, said sum being not less than one-third of the amount of the penalty of the official bond of the treasurer of said school board; and said Sermersheim thereupon executed his official bond as such president of said board, conditioned according to law with sufficient freehold sureties duly acknowledged and approved by appellant as such auditor; that said Sermersheim took and subscribed an oath of office in due form as president of said board; that said bond and oath were filed and recorded in the office of said defendant as such auditor; that he reported the election and qualification of said Sermersheim to the superintendent of public instruction of the State of Indiana. And the bonds presented by the relator on June 24, and June 29, 1896, respectively being insufficient in amount of penalty, being only for \$2,000.00 respectively, and there being no vacancy in said office of president of said school board at the time said relator presented his pretended bonds on said 24th and 29th days of June and 7th day of July, 1896, appellant refused to accept and approve said bonds or any of them.

These are the reasons why the defendant as such auditor did refuse to accept and approve the several bonds afterwards tendered to him by the relator John F. Judy for approval on June 24 and June 29, 1896, and on July 7, 1896, respectively.

The controlling question is whether there was a vacancy in the office of school trustee for the town of Jasper at the time the trustees of the town attempted

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to elect a successor to the relator, John F. Judy, in that office. Appellant maintains that there was such vacancy, notwithstanding the fact that the relator had been duly elected to that office on the 11th day of June, 1894, by the board of trustees of said town for a term of three years which had not yet expired. This contention is based on the fact that the relator had failed and neglected to tender his official bond as president of the school board for more than ten days after his election by such school board as president thereof. It is further contended that such failure operated to vacate the office of school trustee held by the relator. And in support of this contention we are cited to the statute which provides that: "If any officer of whom an official bond is required shall fail, within ten days after the commencement of his term of office and receipt of his commission or certificate, to give bond in the manner prescribed by law, the office shall be vacant." Section 7542, Burns' R. S. 1894 (5527, R. S. 1881).

But it will be observed that the only condition precedent or qualification required of a school trustee by the statute previously quoted, before entering upon the discharge of the duties of the office, is to take an oath to faithfully discharge such duties. And the facts stated in the alternative writ and application therefor, show that the relator took such oath and entered upon the discharge of the duties of school trustee for said town immediately after his election thereto by the board of trustees of said town in June, 1894. The demurrer admits these facts to be true.

But the previously quoted statute requires the school board within five days after their election to organize by electing one of their number as president, one as secretary, and one as treasurer. Then the statute requires the treasurer before entering upon the

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duties of his office to execute a bond to the acceptance of the county auditor, conditioned as in ordinary official bonds, with at least two sufficient freehold sureties in a sum not less than double the amount of money which may come into his hands within one year by virtue of his office. This, it would seem, indicates that the bond is the official bond of the treasurer of the school board, and not that of school trustee. The president and secretary of the school board are each required to give bond with like sureties and approval in a sum not less than one-third the treasurer's bond. It would seem such bonds are the official bonds of the president and secretary of the school board, and not that of school trustees; and hence the failure to give such bond within ten days, vacates the office of such president or secretary and does not vacate the office of school trustee.

But we do not and need not decide that point.

The same statute provides that all vacancies that may occur in the board of trustees of the town shall be filled by the board of trustees of the town. It also provides that the board of trustees of the town shall at the first regular meeting in the month of June elect three school trustees who shall hold their offices, one, two, and three years respectively; and said town board shall each year thereafter elect one school trustee who shall hold his office for three years. It also provides that the school trustees shall each year, within five days after the election of a member, reorganize their board and execute their respective bonds for the ensuing year. There is no question here but that the relator had been elected by the town board to the office of school trustee, and that the school board had elected him president thereof the first and second years of his term, and that while still in office both as school trustee and president of the school

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board he was re-elected president thereof, but that he failed within ten days thereafter to give bond. Nor is there any question that he was still occupying the office when the town board of trustees treating his office as vacant attempted to elect a successor.

The learned counsel for appellant cite *Baker v. Wambaugh*, 99 Ind. 312, as authority that there was a vacancy. In that case a successor to a justice of the peace had been elected and failed to qualify and assume the office. The justice in office assuming that the expiration of the term for which he had been elected ended his right to longer hold the office, he delivered the docket and records belonging to his office to another justice of the township, the board of commissioners appointed another man to fill the office who qualified, gave bond and entered upon the discharge of the duties of the office.

It was held that because the justice whose term had expired without a successor elected and qualified had actually vacated the office, the appointment by the board of commissioners though only authorized in the case of a vacancy made their appointee at least an officer *de facto*. It was impliedly held that the justice vacating the office could have held over until a successor was elected and qualified, by virtue of the constitution, had he not voluntarily vacated the office. The case has more bearing against the appellant than for him.

It is settled that all officers except members of the legislature hold their offices under the constitution for the term for which they are elected, and until their successors are elected and qualified. Section 225. Burns' R. S. 1894 (225, R. S. 1881); *Baker v. Kirk*, 33 Ind. 517; *Steinback v. State*, 38 Ind. 483; *State, ex rel., v. Bogard*, 128 Ind. 480; *Butler v. State, ex rel.*, 20 Ind. 169; *State, ex rel., v. Berg*, 50 Ind. 496.



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Under the constitution officers who are elected for a term, are thereby authorized to continue to hold and discharge the duties and receive the emoluments of their office until they are superseded by other persons in their places even though that extends beyond the legal length of the term for which they were elected. *State, ex rel., v. Harrison*, 113 Ind. 434, 440; *Tuley v. State, ex rel.*, 1 Ind. 500; *Miller v. Burger*, 2 Ind. 337; *Baker v. Kirk, supra*; *State, ex rel., v. Berg, supra*; *Gosman v. State, ex rel.*, 106 Ind. 203; *Elam v. State, ex rel.*, 75 Ind. 518.

The policy of constitutional provisions of that nature is to prevent the happening of vacancies in office except by death, resignation, removal and the like. *State, ex rel., v. Harrison, supra*. As was said in the latter case at page 441: "It adds an additional contingent and defeasible term to the original fixed term, and excludes the possibility of a vacancy, and, consequently, the power of appointment, except in case of death, resignation, ineligibility or the like. *Gosman v. State, ex rel., supra*, and cases cited." To the same effect is *Kimberlin v. State, ex rel.*, 130 Ind. 120.

But it is in effect contended by appellant that these are cases belonging to a class where the supposed vacancy arose alone from the expiration of the term for which the several officers had been elected; and that here it is not on account of the expiration of the term of the relator that the supposed vacancy occurred, but that such vacancy was produced by operation of law resulting from the relator's failure to give bond within ten days after his re-election as president of the school board.

It has been held by this court, and we think correctly so, under the constitutional provision above mentioned, that where a township trustee was elected twice as his own successor, and served both the sec-

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ond and third terms without giving any new bond or taking any new oath of office, there was no vacancy in said office by virtue of the statute already quoted requiring official bonds to be filed in ten days, said statute then being in force. *State, ex rel., v. Berg, supra.* To the same effect is *Butler v. State, ex rel., supra.*

The precise question now before us has in effect been decided by this court in favor of the appellee in *School Town of Milford v. Powner*, 126 Ind. 528.

In that case two of the school trustees were elected by the trustees of the town of Milford in 1878, and one in 1880. No election was afterwards held until 1886. The old trustees continued to hold over because no successors had been elected and qualified. While thus holding over, and just before their successors were elected they entered into a contract with a teacher. After the new trustees came in they repudiated the contract and employed a different teacher. It was insisted that the old trustees were mere usurpers for a period of six years prior to the making of the contract, they during all that time never having been elected, nor having given bond, and while so acting entered into the contract. It is there said, on pages 530, 531, that: "The fact that the old trustees or school board continued in office under the circumstances disclosed did not render them liable to the charge of usurpation. Having been duly elected and qualified in the beginning, and having, pursuant thereto, entered upon the discharge of their official duties, they became officers *de jure* as well as officers *de facto*, and so continued until their successors were duly elected and qualified. Their right to hold over was secured to them by the same authority as was any other part of their term, and their official acts while so holding were as binding upon the corporation as if done during their original term."

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 Citizens' Street Railroad Company *et al.* v. Sutton.
 

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As there was no death, no resignation and no removal or the like of the relator, we are constrained to hold that there was no vacancy in the office of president of the school board of the town of Jasper when its board of trustees attempted to elect a successor to the relator, and that their attempted election of such successor was void. And the acceptance and approval of his bond by the appellant furnished no reason or excuse why he as auditor should not accept and approve the bond tendered by the relator on July 7, 1896.

Therefore there was no error in overruling the demurrer and the motion for a new trial which presents the same question.

It is further contended that the trial court erred in rendering judgment awarding the peremptory writ on sustaining the demurrer without hearing or requiring evidence as there was an answer of general denial to the writ and application. But the record shows that the court only awarded the peremptory writ after hearing the evidence.

The judgment is affirmed.

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 CITIZENS' STREET RAILROAD COMPANY ET AL.  
 v. SUTTON.

[No. 17,655. Filed March 9, 1897. Rehearing denied June 9, 1897.]

**COMPLAINT.—Contributory Negligence.—Necessary Negative Averments.**—In an action for personal injuries based upon the negligence of defendant, an allegation in the complaint that such injuries were sustained without any fault or negligence of defendant sufficiently negatives contributory negligence on the part of plaintiff, unless it clearly appears from the facts specifically alleged that plaintiff was guilty of negligence which contributed to his injury. *p. 173.*

**SAME.—Contributory Negligence.—Knowledge of Danger.**—Averments in a complaint for personal injury, based upon the negligence of defendant, which show that plaintiff had some knowledge of danger, while important as tending to prove contributory negligence, will

148	169
148	530
149	265
149	633
149	709
150	215
150	694

148	169
154	97
148	169
157	219
148	169
160	274

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- not so negative a direct averment therein that he was without fault as to preclude a recovery. *pp.* 173, 174.

**APPEAL AND ERROR.**—*Bill of Exceptions.*—*Longhand Manuscript of Evidence.*—*How Made Part of Record.*—It must affirmatively appear from the record that the longhand manuscript of the evidence was filed in the clerk's office before being incorporated in the bill of exceptions. *pp.* 174-177.

From the Marion Superior Court. *Affirmed.*

*W. H. H. Miller, John B. Elam, Mason & Latta, J. E. Scott and J. B. Curtis, for appellants.*

*Daniel W. Howe and Miller & Barnett, for appellee.*

JORDAN, C. J.—Appellee instituted this action against the appellants, the Citizens' Street Railroad Company and the city of Indianapolis, and recovered a judgment in the lower court for injuries sustained by him on one of the public streets of the city by reason of the alleged negligence of the appellants. The errors assigned are based upon the action of the lower court in overruling separate demurrers of appellants to the complaint, and in denying their separate motions for a new trial. The complaint after setting out several ordinances adopted by the city of Indianapolis, which provide in detail as to the manner of laying and maintaining street railroad tracks, and also requiring that the space between such tracks, and also to an extent two feet outside of each rail, shall conform to the grade of the street, and further providing that the company operating the railroad shall be liable for damages resulting from its negligence, etc., proceeds to charge that appellant, the street railroad company, under the laws of this State and the ordinances set out, operated and maintained upon South Meridian street of the city of Indianapolis, a street railroad track in the center of said street; that by the running of the cars of the said railroad company drawn by mules

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over and along said street, two deep ruts, in depth from eight to ten inches, had been worn in the space between the rails of said track and were separated by a high ridge of dirt in the middle of said space, and that neither the latter space nor the space to the extent of two feet outside of the rails and adjoining the same, conformed to the grade of the street; that from the condition of said tracks the street was rendered very unsafe and dangerous for travelers thereon in wagons and other vehicles to cross said tracks. It is further averred that the track on the street at the time of the accident of which plaintiff complains, and for six months prior thereto, was, and had been in said unsafe and dangerous condition, and that its said condition could easily have been discovered by the officers of said city having the supervision of its streets, and by said Citizens' Street Railroad Company, and was in fact well known to both of the defendants, but that each of them, nevertheless, wrongfully and negligently failed and refused to fill up said ruts or make the space between the rails of the track conform to the grade of said street. The complaint continuing charges as follows: "That on September 8, 1892, the plaintiff, who then resided a few miles distant from the city of Indianapolis, after having transacted the business in which he had been engaged in said city, was returning home, and his most direct and convenient route home, was by way of said South Meridian street along the east side of which he was driving in a two-horse wagon; that shortly before he reached the point where he received the injuries hereinafter mentioned, he discovered that a short distance ahead of him the space between said railroad track and the east side of said street was so blockaded by some building materials that he could not drive past the same on that side of the street; neither was the space between

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said track and the east side of said street wide enough to permit him to turn round and go back; and furthermore, the deep ruts hereinbefore mentioned and the unsafe and dangerous condition of said tracks extended for fully one-half mile north and south of the point where he then was; so that it became necessary for plaintiff to cross the tracks of said defendant, the Citizens' Street Railroad Company, at that point, which was about one square south of the intersection of said South Meridian and Morris streets; that he then and there attempted to drive across said track, looking and driving as carefully as he could, but in making said attempt, and without any fault or negligence whatever on his part, and solely by reason of the negligence of the defendants as aforesaid, the front wheels of his wagon dropped suddenly into said ruts and so caused him to lose his balance, whereby he fell from his wagon upon the ground, striking the same with great violence, thereby causing a compound fracture of the femur of his right leg, breaking the bones of his right knee and destroying the joint thereof, fracturing the skull, breaking the bones of his face, and greatly maiming and bruising other parts of his body and injuring his head, spine and spinal column."

Near the close is a general allegation as follows: "That all of said injuries were caused by the negligence of the defendants as aforesaid, and without any fault or negligence on his (plaintiff's) part." Counsel for appellant insist that the complaint is insufficient for the reason that it appears from its allegations that appellee had knowledge of all the dangers of the situation which confronted him, and that the absence of contributory negligence upon his part at the time of the alleged injury does not sufficiently appear.

Their contention seems to be that the specific aver-

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ments of the pleading affirmatively disclose that the appellee knew of the dangerous condition of the street at the time the accident occurred, and that this must be deemed to raise a conclusive presumption of contributory negligence on his part. But in this contention counsel are clearly mistaken. In addition to the general averment of the absence of fault, or negligence on the part of appellee, the complaint specifically avers that while attempting to drive across the track of the street railroad he "was looking and driving as carefully as he could, but in making said attempt and without any fault or negligence whatever on his part, and solely by reason of the negligence of the defendants as aforesaid, etc.," the accident resulted by which he was injured. As a rule of pleading, in actions of this character, where the complaint alleges that the injury of which the plaintiff complains was sustained without any fault or negligence on his part, the complaint will be adjudged sufficient in this respect, unless it clearly appears from the facts specifically alleged that the plaintiff was guilty of negligence which contributed to his injury. The decisions of this court which affirm this rule are numerous. *Town of Albion v. Hetrick*, 90 Ind. 545; *Ohio, etc., R. W. Co. v. Walker*, 113 Ind. 196; *City of Elkhart v. Witman*, 122 Ind. 538; *Board, etc., v. Creviston*, 133 Ind. 39.

It is true that the complaint charges that the unsafe and dangerous condition of the track on the street in question "could easily have been discovered by the officers of said city having the supervision of its streets, and by said Citizens' Street Railroad Company." But in the face of the direct averment that appellee was without fault on his part, it cannot be reasonably inferred that he had knowledge of the dangerous condition of the street, and thereby contributory negligence must be imputed to him. At the most,

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it could only be inferred from these facts that he knew, or might have known, of the defective condition of the street, but not of its unsafe or dangerous condition. Conceding, however, that it might be said that he had knowledge of the ruts in controversy, such knowledge alone would not be conclusive of his contributory negligence. While it would be important as tending to prove such negligence, it would not of itself be sufficient to establish that fact. Neither can it be asserted as a legal rule, in all cases, that knowledge alone that there is some danger will preclude a recovery. *Nave v. Flack*, 90 Ind. 205; *City of Richmond v. Mulholland*, 116 Ind. 173; *City of Elkhart v. Whitman*, *supra*; *Town of Poseyville v. Lewis*, 126 Ind. 80; Elliott, Roads and Streets, 470, and authorities cited under note 2. We are of the opinion that the complaint is not open to the objections urged.

The questions which appellants seek to present, relating to the sufficiency of the evidence and the rulings of the court upon admitting and excluding evidence, and upon instructions given and refused, cannot be reviewed in this appeal, for the reason that these questions depend upon the evidence, and this is not properly before us. The record discloses that the bill of exceptions was signed and filed on April 2, 1894, and the clerk certifies that the longhand manuscript of the verbatim report of the evidence was filed in his office on the 2d day of April, 1894, but it does not affirmatively appear from the certificate of the clerk or otherwise from the record, that the filing of this manuscript of the evidence occurred prior to its being incorporated into the bill of exceptions. The statute authorizing the longhand manuscript of the shorthand report of the evidence, given upon a trial of a cause, to be certified to this court upon appeal, requires the party desiring to avail himself of this statutory right



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to file the same with the clerk before it is incorporated into a bill of exceptions. This duty, under the statute, rests upon the party who seeks by this method to have the evidence certified to this court, hence no presumptions or inferences on this question can be indulged in his favor; but it must affirmatively appear that he has complied with the requirement of the statute by first filing the manuscript with the clerk of the lower court before it was incorporated into the bill of exceptions, otherwise it cannot be regarded as properly in the record. This interpretation of the statute has been settled by repeated decisions of this court. *DeHart v. Board, etc.*, 143 Ind. 363; *Hamrick v. Loring*, 147 Ind. 229; *Manley v. Felty*, 146 Ind. 194; *Rogers v. Eich*, 146 Ind. 235.

There is no available error presented, and the judgment is affirmed.

## ON PETITION FOR REHEARING.

JORDAN, J.—The only reason urged by appellants for a hearing in this cause is that the court erred in holding that the longhand manuscript of the evidence was not properly a part of the record. It is insisted that by reason of the fact that the longhand report of the evidence and the bill of exceptions into which it is purported to be incorporated were both filed on the same day, that we should infer or presume that the filing of this manuscript must necessarily have preceded the signing of the bill of exceptions by the trial court. But the duty of filing the original manuscript of the evidence in such cases, with the clerk of the lower court is, as we held, under the express provision of the statute then in force required to be performed by the party who is intending to have it incorporated into a bill of exceptions and certified to this court

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upon appeal of the cause, instead of a transcript thereof. Acts 1873, p. 194, section 1476, Burns' R. S. 1894 (1410, R. S. 1881). Under the requirements of the law it is evident, we think, as held in the original opinion, that it is incumbent upon the party seeking to avail himself of having the evidence certified to this court, under the provision of this statute, to affirmatively disclose by the record that he first filed the manuscript with the clerk before it was incorporated into the bill of exceptions, and that in the absence of such affirmative showing, we are precluded from indulging in any presumptions or inferences in his favor upon this question. The statute, we think, intended to make the filing of the longhand manuscript of the evidence "by the party entitled to the use of the same," a condition precedent to its being incorporated into a bill of exceptions. The only proof that the court has that this required condition has been performed by the party, is that established by the record or certificate of the clerk. It is also insisted that when the bill of exceptions in the case at bar was made up, the sole expression upon the point involved, was what was asserted in *Hull v. Louth*, 109 Ind. 315, and that nothing had been held to the contrary, until the decisions of *Holt v. Rockhill*, 143 Ind. 530; *DeHart v. Board, etc.*, 143 Ind. 363.

In this insistence, however, counsel are mistaken. In the appeal of *Mason v. Brody*, 135 Ind. 582, decided several months before the record in the cause now under consideration was made, this court expressly denied the rule affirmed upon this point in *Hull v. Louth, supra*, by holding that "the shorthand reporter's manuscript of the evidence could not be incorporated in the bill of exceptions until after it had been first filed in the office of the clerk of the court in which the cause was tried."

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State, *ex rel.* Schrisler, *v.* Winter.

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In *Smith v. State*, 145 Ind. 176, it was expressly declared that the holding in the Hull case upon this point was overruled by the former decisions.

Petition overruled.

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STATE, *EX REL.* SCHRISLER, *v.* WINTER.

[No. 18,145. Filed June 9, 1897.]

**ELECTIONS.—City Officers.—General Elections.—Statute Construed.—**

Under the provision of section 8476, Burns' R. S. 1894, general elections are held quadrennially, beginning on the first Tuesday in May, 1894, and the successor of a city treasurer elected at a special election after the incorporation of such city in 1894 could not be elected until the first Tuesday in May, 1898. *p.* 179.

**APPEAL AND ERROR.—Amendment of Pleading.—Presumption.—**

Where the record does not show a request to amend a pleading it will be presumed on appeal that leave to amend was not sought. *p.* 180.

From the Blackford Circuit Court. *Affirmed.*

*Elisha Pierce, John A. Bonham, Aaron M. Waltz, D. H. Fouts, B. G. Shinn and E. Shinn*, for appellant.

*Cantwell, Cantwell & Simmons and Jay A. Hindman*, for appellee.

HACKNEY, J.—This was a proceeding in the nature of a *quo warranto* to oust the appellee from the office of treasurer of Hartford City, the relator claiming the office by election. The petition was in two counts; the first claiming the office from May 10, 1896, and the second claiming it from September 7, 1896. The trial court sustained a demurrer to each count, and that ruling presents the only question for consideration.

Each count alleged that in April, 1894, the then town of Hartford City was incorporated as a city; that on the second Tuesday in May, 1894, the appellee was

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*State, ex rel. Schrisler, v. Winter.*

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elected, with other officers of said city, to the office of treasurer, and thereafter qualified and discharged the duties of said office, and was occupying the same when this proceeding was instituted; that at the election in said city on the first Tuesday in May, 1896, the relator and others were candidates for said office, and that he was elected thereto and received a certificate of election; that he qualified and demanded from the appellee, on May 10 and September 7, 1896, the possession of said office, which was refused. The petition is sought to be supported upon the theory that on the second Tuesday in May, 1894, the office of treasurer of said city was vacant and that the election of the appellee on that day was to fill the vacancy, it is said for the unexpired part of the term ending, from one standpoint in September, 1894, and from another, when his successor was elected and qualified.

Vacancies in the office of city treasurer are not filled by election, but by appointment of the common council. Sections 3483, 3484, Burns' R. S. 1894. A consideration of section 3468, Burns' R. S. 1894, does not deny this conclusion, since that section does not provide for the filling of vacancies in that office, nor does it prescribe the times when, under the election therein provided for, the officer shall begin or shall end his services.

It is provided therein that "the trustees or common council of such town or city shall, within five days after the filing of" the certificate of the election to become a city, divide the city into wards, and publish notice that an election will be held on a day and at places named "for the election of the city offices specified in such notice." It must be that this provision is for a special election to fill offices for a newly created city. Whether such offices are vacant in the sense in which that word is employed in sections 3483,

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3484, *supra*, is not, in our view of the case, material. But if it should be held that the special election was only for such offices as could not be filled by appointment, namely: councilmen, because none were in office to make the appointments to other offices, and city judge, because that is the only office the vacancy in which is filled by election ordinarily, it would seem that the office of treasurer was not one a vacancy in which could be filled by election. We are, however, not concerned with the question of the title of the appellee to the office as he acquired it, but we are to inquire as to the validity of the relator's title, for if he had no title his petition was bad.

The relator has no claim, and asserts none, under said section providing for a special election. Whatever strength his claim has must be found from section 3476, Burns' R. S. 1894, in relation to the filling of said office by general city elections. That section was in force, not only when the appellee was elected, but when the relator was voted for, and was an amendatory section providing a uniform period of elections, and the beginning of the terms of office of treasurer, and other general city officers and councilmen. By it elections for councilmen are held biennially, beginning with the first Tuesday in May, 1894, and elections for treasurer and other general officers are held quadrennially beginning with an election on the first Tuesday in May, 1894. One manifest object of the amendment was to secure uniformity in both the elections, and the beginning and ending of the terms of office of city officers, and constructions thereof must, when reasonable, support that object. This being true, it follows that the first election at which a treasurer for Hartford City could be elected, after the special election in May, 1894, would be that of the first Tuesday in May, 1898. Suggestion has been made that under

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section 3476, *supra*, general elections are held biennially. The phrase "general election" is employed but twice in the section and in each instance with special reference to the officers of mayor, treasurer, and other officers who are elected by the general vote of the electors of the city.

If, as we conclude, the relator was not elected at a time authorized by law, he has no title to the office.

There is an assignment of error that the court erred in rendering judgment on the demurrer, and it is insisted that because the ruling and judgment are entered as one act, there was given the appellant no opportunity for amendment. No doubt the appellant was entitled to amend the petition, but not without a desire or request to do so, and we must presume, from the silence of the record on the subject, that leave to amend was not sought or desired. *Hedrick v. Whitehorn*, 145 Ind. 642.

However, it has been held that an assignment of the character mentioned presents no question for review. *McGinnis v. Boyd*, 144 Ind. 393.

The judgment is affirmed.

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ERGANBRIGHT v. THE STATE.

[No. 18,161. Filed June 9, 1897.]

148 180  
1153 232

CRIMINAL LAW.—*Appeals*.—Appeals in criminal cases can only be taken from final judgments.

From the Greene Circuit Court. *Appeal dismissed*.

*Frederick W. Cady*, for appellant.

*W. A. Ketcham*, Attorney-General, *Merrill Moores*,  
*C. D. Hunt* and *Davis & Moffett*, for State.

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Johnson *et al.* v. Ballard *et al.*


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MONKS, J.—Appellant was charged by indictment with the crime of embezzlement under the provisions of section 2031, Burns' R. S. 1894 (Acts 1891, p. 395).

Appellant moved to quash each count of the indictment, which motion was overruled. Appellant filed a special plea in bar, to which appellee demurred for want of facts, which demurrer was sustained by the court. The cause was continued and is still pending in the court below.

This appeal is taken from the decision of the court below overruling the motion to quash, and in sustaining the demurrer to the plea in bar.

It is settled law that appeals in criminal cases can only be taken from final judgments. *Farrel v. State*, 7 Ind. 345; *Miller v. State*, 8 Ind. 325; *Wingo v. State*, 99 Ind. 343; *State v. Evansville, etc., R. R. Co.*, 107 Ind. 581.

No final judgment having been rendered in said cause, this court has no jurisdiction of the appeal.

The appeal is dismissed.

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JOHNSON ET AL. v. BALLARD ET AL.

[No. 17,952. Filed April 7, 1897. Rehearing denied June 9, 1897.]

APPEAL AND ERROR.—*Bill of Exceptions.*—*When no Time is Given to File.*—When no time is given in which to file a bill of exceptions, and it is signed and filed after the expiration of the term at which the motion for a new trial was overruled and judgment rendered, such bill of exceptions is not a part of the record and cannot be considered on appeal.

From the Dubois Circuit Court. *Affirmed.*

*Linn D. Hay, Bretz & McFall, Rogers & Rogers and J. W. Catterson*, for appellants.

*William A. Traylor and Winfield S. Hunter*, for appellees.

148	181
153	549
148	181
154	412

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MONKS, J.—The only errors assigned and not waived are: (1) "The court erred in overruling appellants' motion for a new trial as of right. (2) The court erred in overruling appellants' motion for a new trial."

The record shows that appellants moved the court for a new trial as of right and filed their undertaking as required by section 1076, Burns' R. S. 1894 (1064, R. S. 1881), which was approved. Before the court ruled upon said motion appellants filed their motion for a new trial, assigning numerous causes therefor, which motion the court overruled. It is not shown by the record, however, that the court ever ruled upon the motion for a new trial as of right.

It is evident, therefore, that the assignment of error that "the court erred in overruling appellants' motion for a new trial as of right" presents no question for the reason that the record does not show any such ruling was made. Besides, by filing the motion for a new trial for cause, before the court had ruled upon the motion for a new trial as of right, appellants waived their right to have the last mentioned motion passed upon by the court.

The questions presented by the motion for a new trial for cause depend for their determination upon the evidence, which is not in the record. The motion for a new trial was filed and overruled November 2, 1895, at the September term of the court, which was after the rendition of the judgment. No time was given in which to file a bill of exceptions. The bill of exceptions was filed January 15, 1896, which was after the time allowed by law for the September term of said court.

It is settled law that when no time is given in which to file a bill of exceptions and it is signed and filed after the expiration of the term at which the motion



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for a new trial was overruled and judgment rendered, the same is not a part of the record and cannot be considered. *Campton v. State*, 140 Ind. 442, 445; *Engleman v. Arnold*, 118 Ind. 81, 82, and cases cited; *Loy v. Loy*, 90 Ind. 404; *Benson v. Baldwin*, 108 Ind. 106; *Sohn v. Marion, etc., Gravel Road Co.*, 73 Ind. 77; *Nye v. Lewis*, 65 Ind. 326.

As the assignment of errors presents no question for our determination, the judgment is affirmed.

## MADDEN v. THE STATE.

[No. 18,178. Filed May 25, 1897. Rehearing denied June 9, 1897.]

**APPEAL AND ERROR.—Evidence.—When in Record.**—Where the transcript does not purport to contain the original longhand manuscript of the evidence, and the bill of exceptions states that it contains all the evidence given in the cause, certified by the judge and clerk of the trial court the evidence is properly in the record. *pp. 184, 185.*

**TRIAL.—Practice.—Withdrawal of Evidence from Jury not an Instruction.—Statute Construed.**—An oral statement made by the trial judge at the close of the evidence, and after the opening argument had been made, withdrawing certain testimony from the jury, is not an instruction within the meaning of section 1892, Burns' R. S. 1894 (1823, R. S. 1881). *pp. 185, 186.*

**SAME.—Evidence.—Error in Admission.—How Cured.**—An error in the admission of evidence is cured by the court afterward withdrawing same from the jury, where it is not shown that the complaining party was harmed thereby. *p. 186.*

**SAME.—Practice.—Withdrawal of Evidence from Jury.—Waiver of Error.**—Where the court after the close of the evidence and the beginning of the argument made an oral statement to the jury withdrawing from their consideration certain evidence admitted over objection, error, if any, was waived by the failure of counsel to move the discharge of the jury. *pp. 186, 187.*

**APPEAL AND ERROR.—Conflicting Evidence.—Criminal Law.**—The Supreme Court will not weigh the evidence in a criminal cause for the purpose of settling conflicts therein. *p. 187.*

From the St. Joseph Circuit Court. *Affirmed.*

148	183
148	524
151	121

148	188
157	530

148	183
167	234

148	183
169	508

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*J. W. Talbot and J. E. Talbot, for appellant.*

*W. A. Ketcham, Attorney-General, and Thomas W. Slick, for State.*

MCCABE, C. J.—The appellant was convicted of grand larceny on an indictment charging him with grand larceny, burglary, and receiving stolen goods, the jury fixing his punishment at \$5.00 fine and three years in the penitentiary.

The trial court overruled his motion for a new trial, which ruling is called in question by his assignment of errors. The motion, among other things, assigned as reasons therefor that the court, over appellant's objection, permitted the State to prove that some months prior appellant had been arrested in St. Joseph county on another charge of grand larceny, and the court, after a proper request from appellant that all instructions be in writing, over appellant's objection, gave an oral instruction.

We are met on behalf of the State by an objection to the consideration of these questions, because it is insisted that the evidence and the matters involved in this exception are not in the record. It is claimed that there is nothing to show that the longhand manuscript was filed in the clerk's office before its incorporation in the bill of exceptions, or that it was ever filed in the clerk's office. That is true, but there is nothing to show that the original longhand manuscript was ever incorporated in the bill of exceptions, but the transcript purports to contain a transcript of the bill of exceptions including a copy of the longhand manuscript, if it ever was incorporated in the bill of exceptions.

Where the transcript does not purport to contain the original longhand manuscript, but where the bill, as here, states that it contains all the evidence given in the cause, there is no reason why such transcript

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should show that the longhand manuscript of the evidence and its incidents was ever filed in the clerk's office.

It is sufficient if the judge certifies as he has here that the bill of exceptions contains all the evidence given in the cause, and the clerk certifies as he has here "that the above and foregoing transcript contains complete copies of all the papers and entries in said cause," the transcript otherwise showing the filing of the bill of exceptions in said cause.

The bill of exceptions shows that at the beginning of the trial the defendant filed a written paper reading thus: "The defendant requests the court to reduce his charge and instructions in this cause to writing, and to give no instructions unless the same have been reduced to writing," signed by his counsel.

And the bill of exceptions further shows that after the evidence in the case had been closed and the opening argument had been made by the deputy prosecuting attorney on behalf of the State, the court gave orally to the jury, of its own motion, an instruction in the words and figures following, to-wit: "Gentlemen of the jury, while the defendant himself was on the witness stand, a motion was made by the defendant's counsel to strike out certain testimony referring to the defendant's former arrest in this county, and the sheriff and chief of police were called in rebuttal for the State. I have come to the conclusion that that ought not to have gone to the jury. Therefore, I instruct you that whatever testimony refers to the former arrest be disregarded by you."

The giving of this instruction orally and without being reduced to writing was at the proper time objected to by appellant's counsel, which objection was overruled by the court, to which ruling appellant at the time excepted. The giving of the instruction

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orally and without being reduced to writing, under the circumstances, it is claimed by appellant, was a violation of the statute rendering the granting of a new trial imperative on the court. Section 1892, Burns' R. S. 1894 (1823, R. S. 1881), sub-section 5.

That such a direction is but a method of striking out the evidence mentioned therein, and is not an instruction within the meaning of the statute is well settled by the decisions of this court. *Stanley v. Sutherland*, 54 Ind. 339; *McCallister v. Mount*, 73 Ind. 559; *Lawler v. McPheeters*, 73 Ind. 577; *Trentman v. Wiley*, 85 Ind. 33; *Bradway v. Waddell*, 95 Ind. 170; *Lehman v. Hawks*, 121 Ind. 541.

It is insisted by the appellant that the court erred in admitting the evidence referred to in said instruction for which the motion for a new trial ought to have been sustained. But it is contended on behalf of the State that the error was cured by the court afterwards in excluding it entirely from the consideration of the jury. That is well settled law in this State, especially where the complaining party fails to show affirmatively that notwithstanding such withdrawal of such inadmissible evidence that it harmed him. There is no such showing in this case. *Shepard v. Goben*, 142 Ind. 318; *Zehner v. Kepler*, 16 Ind. 290; *Adams v. Dale*, 38 Ind. 105; *Indianapolis, etc., R. W. Co. v. Bush*, 101 Ind. 582; *Wishmier v. Behymer*, 30 Ind. 102; *Gebhart v. Burkett*, 57 Ind. 378; *Moore v. Shields*, 121 Ind. 267; *Blizzard v. Applegate*, 77 Ind. 516; *Evansville, etc., R. R. Co. v. Montgomery*, 85 Ind. 494; *Houser v. State, ex rel.*, 93 Ind. 228.

But if we were even in error in holding that the withdrawal of the evidence cured the error, the appellant has waived it. After the court saw and confessed its errors, by withdrawing the evidence, if appellant thought such withdrawal of evidence did not cure the

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error and that it would influence the jury to his injury, it was his duty to move to discharge the jury that he might have a jury free from such influence. His failure to do so was a waiver of the error if any there was. *Coleman v. State*, 111 Ind. 563; *Henning v. State*, 106 Ind. 386, and cases cited in each. See *Townsend v. State*, 147 Ind. 624.

The only other error complained of under the motion for a new trial is that the evidence is not sufficient. We have examined it and find the evidence as to appellant's guilt conflicting. But there was sufficient competent evidence adduced by the State from which the jury might reasonably and logically infer every essential fact necessary to constitute the appellant's guilt of the crime of grand larceny, of which they found him guilty. It is true the evidence of his guilt was circumstantial, that is, it consisted in the fact that he was found in the exclusive possession of the recently stolen property, and he made no attempt to explain such possession. This was sufficient to warrant the inference of his guilt. *Clackner v. State*, 33 Ind. 412; *Way v. State*, 35 Ind. 409; *Smathers v. State*, 46 Ind. 447; *Jones v. State*, 49 Ind. 549; *Bailey v. State*, 52 Ind. 462, 21 Am. Rep. 182.

This court, on appeal, cannot correct any error of fact if any such has been committed by the jury in determining the weight of the evidence, nor can we reweigh it so as to settle conflicts therein. *Deal v. State*, 140 Ind. 354; *Kleespies v. State*, 106 Ind. 383; *Hudson v. State*, 107 Ind. 372; *Skaggs v. State*, 108 Ind. 53; *State v. McKee*, 109 Ind. 497.

The circuit court did not err in overruling the motion for a new trial.

Therefore, the judgment is affirmed.

HOWARD, J., took no part in the decision of this cause.

148	188
156	40
148	188
171	481

THE CINCINNATI, INDIANAPOLIS, ST. LOUIS AND CHICAGO  
RAILWAY COMPANY v. MCLAIN.

[No. 17,191. Filed June 9, 1896. Rehearing denied June 9, 1897.]

**PRACTICE.**—*Variance Between Allegations of Complaint and Proof.*—

A plaintiff must recover according to the allegations of his complaint, or not at all. He cannot recover on the evidence which makes a case materially different from the case made by the pleadings. *p. 193.*

**CARRIERS.**—*Injury to Passenger.*—*Contributory Negligence.*—A passenger on a railroad train, in the night time, desiring to get off at a certain crossing where the train usually stopped, was informed by the conductor that he could get off, and was directed by the conductor to go upon the platform of the car when the train reached a certain point, and be ready to get off when the train arrived at the crossing. The passenger not only went upon the platform, but, while the train was going twelve or fifteen miles an hour, and at a point 1,600 feet from the crossing, went upon the lower step of the car, and, by a sudden jerk of the train, was thrown from the car and injured. *Held*, that the passenger was guilty of contributory negligence which precluded recovery. *pp. 193-195.*

From the Marion Superior Court. *Reversed.*

*B. K. Elliott, W. F. Elliott and J. T. Dye, for appellant.*

*Ayres & Jones and W. A. Ketcham, for appellee.*

HOWARD, J.—This was an action for damages brought by the appellee for personal injuries, caused, as alleged, by the negligence of the appellant.

The accident occurred at a point on appellant's line of road a little east of where the same crosses the Indianapolis Belt Railroad, and while appellant's train was approaching the city from the east, between ten and eleven o'clock on the night of June 28, 1888.

Appellee was a passenger, and it appears that he

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wished to leave the train at the crossing of the Belt road.

It is alleged in the complaint that as the train neared the city, the appellee "inquired of the conductor in charge of said train whether or not he could get off safely at the crossing of the Belt railroad near the city of Indianapolis, and whether the train upon which he was riding would stop at said crossing; that he was informed by said conductor that the train would stop and he could get off without any danger, if he so desired; that the conductor directed him as soon as they should come to freight cars standing on the side track, which he told the plaintiff would be the first freight cars that they would pass after the time the conductor and the plaintiff were talking, to go upon the platform and be ready to get off as soon as the train came to a stop; that when the train came to the freight cars, the plaintiff, pursuant to the direction of the conductor of said train, went out upon the platform, and, as the train slowed up, he walked down to the lower step to be ready to get off, as directed by the conductor, so soon as the train should stop; that the train came nearly to a stop, but without entirely stopping, it was negligently started up with a sudden and violent jerk to go forward again, and whereby the plaintiff was thrown under the cars and so that the car wheels passed over and cut off both of his legs, and so injured him that both of his legs had to be amputated above the said injury;" that by reason of said injury he has suffered and will always suffer, and has been incapacitated from work and labor, all to his damage in the sum of \$10,000.00; "that the place where he was directed to get off of said cars by said conductor was not a safe and proper place for him to get off; that said injury occurred by reason of the negligence of the said railroad company, and without any

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fault or negligence whatever on his part contributing thereto."

The cause was submitted to a jury who returned a verdict for appellee in the sum of \$5,500.00, together with answers to interrogatories submitted by the appellant and by the appellee.

Numerous alleged errors are assigned and discussed by counsel; but the bill of exceptions does not appear to be in the record; and the only questions before us relate to the sufficiency of the complaint, and to the correctness of the court's action in overruling appellant's motion for judgment on answers to interrogatories, notwithstanding the verdict of the jury.

The answers to interrogatories show, that at the time of his injury, June 28, 1888, appellee was a passenger on appellant's train, from Valley Junction to Indianapolis; that shortly before the train reached the Belt road he informed the conductor that he desired to get off at the crossing, and asked if he could do so; that the conductor gave the required permission, and informed appellee that he could get off without danger; that shortly before arriving at the crossing the conductor directed appellee that as soon as they reached certain freight cars standing beside the track he should get upon the platform and be ready to step off when the train should come to a stop; that the Belt road crossing was at the time a crossing of appellant's main line, the Belt road being a railroad over which passengers might be transported; that at and prior to the time of the accident the appellant was accustomed to stop its trains at the Belt and permit passengers to alight; that appellee knew that there was no passenger station or platform at or near the crossing, and knew that the Belt road was not advertised as a stopping place for the receiving or discharge of passengers, and that the stop there was a short one; that there was



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then a signal keeper on duty at night, and it was the practice to slow up the train as it approached the crossing, and if a white signal was given by the keeper, showing a clear track, the train would pass on to the city without coming to a full stop; that the appellee was familiar with the movement of west-bound trains at the Belt crossing, having gotten off there before; that his reason for desiring to get off at the crossing was that he wished to visit a relative living near there; that after the point was reached where the freight cars stood along the side track, the appellee got up and went out upon the platform and down to the lower step, prepared to alight when the train should come to a stop; that he stood upon the lower step, holding on to the railing and waiting for the train to stop so that he might alight; that as the train approached the Belt road it began to slow up, the steam being shut off and the air brakes applied, until it was going at a speed of about four miles an hour; that after the train had slowed up until it was running about twelve or fourteen miles an hour, and while appellee was standing on the lower step waiting to alight, the air brakes were suddenly loosed and the train started on without having come to a stop, whereby appellee was thrown from the steps and injured as alleged in the complaint; that the conductor did not notify the engineer to stop at the crossing, and the engineer did not know that the appellee was on the step or intending to get off; that the injury was not caused by the failure of the train to come to a stop at the crossing, having occurred further east than the point where the train usually stops; that the fact that the train did not come to a full stop at the usual stopping place, after slowing up, but started up again, had no effect as to the injuries of appellee; that the appellee, by direction of the conductor, went out volun-

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tarily upon the platform and took the lower step while the car was in motion as it approached the Belt road; that the position taken by appellee on the lower step was a dangerous one, and known by him to be dangerous; that it was dark at the time, and between ten and eleven o'clock at night; that the conductor was in the car at the time the appellee went upon the platform, and had some conversation with him about getting off before that; that the engineer when about half or three-quarters of a mile from the crossing sounded his whistle and turned off steam; that when the train reached the switches, about 1,600 or 1,800 feet from the crossing, the air brakes were applied by the engineer, and after passing the switches the brakes were released; that after the engineer reached a point about 250 feet from the crossing the air brakes were again turned on, and the speed of the train reduced to three or four miles an hour; that the injury to appellee occurred about 1,600 feet east of the Belt road; that it was the practice of appellant, when the signal showed the Belt track not clear, to stop about 200 or 250 feet east of the crossing; that the appellee was injured several hundred feet east of the crossing and when the train was running twelve or fourteen miles per hour.

It is first contended by appellant that the facts, as found by the jury, do not make out a case, as stated in the complaint. In the complaint it was alleged that the appellee inquired of the conductor "whether or not he could get off safely at the crossing at the Belt railroad near the city of Indianapolis, and whether the train upon which he was riding would stop at said crossing; that he was informed by said conductor that the train would stop, and he could get off without any danger, if he so desired." But it appears from the answers to interrogatories that the accident did not happen "at the crossing of the Belt railroad," at the point

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where the train usually stopped before crossing the Belt, but at a point about 1,600 feet, or over a quarter of a mile east of the crossing, just after the train passed the switches. The train did, in fact, come almost to a stop at the usual stopping place, 250 feet east of the Belt, the speed being there reduced to three or four miles an hour; while at the switches, where appellee was hurt, it was running at the rate of twelve or fourteen miles an hour.

Whether it could be said that the switches, 1,600 or 1,800 feet east of the Belt, were "at the crossing of the Belt railroad," in such a sense as to make the complaint good for an injury caused at the switches, but which was alleged to have been caused at the crossing where the train usually stopped, at a point only 250 feet from the Belt road, may admit of grave doubt. There is no pretense that the train ever stopped at the switches, though it does appear from the facts found that it was there slowed up to a speed of twelve or fourteen miles an hour, in order to pass the switches, then resuming its faster rate until it reached the point 250 feet from the Belt, there to wait for a clear track over the crossing.

No rule is better established than that a plaintiff must recover according to the allegations of his complaint, or not at all. He cannot recover on evidence which makes a case materially different from the case made by his pleadings. *Cleveland, etc., R. W. Co. v. Wynant*, 100 Ind. 160.

But a more serious question arises, both as to the allegations of the complaint, and more particularly as to the facts found by the jury, and that is, whether contributory negligence is not shown on the part of the appellee.

He was well acquainted with the locality and with

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the movements of trains at that point. He knew that there was neither station nor platform at the place, and that passengers were permitted to alight only for their own accommodation, and because the train necessarily stopped there, or came nearly to a stop, in order to pass the Belt line in safety. It was late at night and dark, which added to the risk which he assumed. He desired to visit a relative living near the crossing. He was not in any way required by the conductor, or other official, to leave the train; but was permitted to do so at his own request.

It is said that the conductor told him to go out upon the platform as soon as the freight cars were seen near the track, and be ready to step off when the train came to a stop. Even if this could be an excuse to relieve him from blame for going upon the platform; yet it does not appear that any danger would have resulted to him from merely going upon the platform, as the conductor directed. He was not content to stay upon the platform, a place of comparative safety; but went down and stood upon the lower step, while the train was going over the switches at the rate of twelve to fourteen miles an hour. The jury find that this was a dangerous place; and find, moreover, that he knew that it was dangerous. The rough movement of the cars over the switches, their swinging from side to side, and the necessary changes in the rate of speed, made it an exceedingly hazardous place to stand, particularly at night. The appellee took this place himself, and not by direction of the conductor, who told him to go upon the platform. No doubt appellee thought himself perfectly competent to look out for his own safety in a place which he knew to be one of peril; the jury find that he had got off there before.

While, under the circumstances, we do not think that the permission of the conductor to go out upon

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the platform could be an excuse for one to go into a place of known peril, yet it is clear that if the appellee had stayed upon the platform until the train slowed up near the Belt, at the usual place of stopping, he could have then gone down the steps and alighted in safety, as was the evident result intended by the conductor. But even if the conductor had directed him to go down and stand upon the lower step, that could not justify him in taking a position known to him to be one of great danger. *Cincinnati, etc., R. R. Co. v. Carper*, 112 Ind. 26, and authorities cited at page 29.

We think it is clearly shown from the record that the appellee was himself guilty of contributory negligence in going upon the lower step of the platform at night and while the train was running at a speed of twelve to fourteen miles an hour. See generally, *Goldstein, v. Chicago, etc. R. W. Co.*, 46 Wis. 404, 1 N. W. 37; *Chicago, etc., R. R. Co. v. Hazzard*, 26 Ill. 373; *Hoehn v. Chicago, etc., R. W. Co.*, 152 Ill. 223, 38 N. E. 549; *Toledo, etc., R. R. Co. v. Wingate*, 143 Ind. 125, 58 Am. and Eng. R. R. Cases, 232, and authorities cited in last case.

Even, therefore, if the answers to interrogatories were responsive to the allegations of the complaint, still these answers show that appellee was himself guilty of negligence contributing to his injury, and consequently that he cannot recover.

The judgment is reversed, with instructions to render judgment in favor of the appellant on the answers to interrogatories, notwithstanding the verdict of the jury.

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**PITTSBURGH, CINCINNATI, CHICAGO AND ST. LOUIS RAILWAY COMPANY v. MAHONEY, ADMINISTRATOR.**

[No. 17,988. Filed April 22, 1897. Motion to Modify Mandate denied June 10, 1897.]

**CARRIERS.—Common Carriers May Contract as Private Carriers.—Exemption From Liability for Negligence by Contract.**—Railway companies may contract as private carriers in transporting express matter for express companies, and in such capacity may require exemption from liability for negligence as a condition to the obligation to carry. pp. 199, 200.

**MASTER AND SERVANT.—Exemption From Liability.—Express Company.—Notice to Servant.**—An employe of an express company who goes upon the tracks of a railroad company in the course of his employment is chargeable with notice of a contract between the express company and the railroad company to the effect that the former will hold the latter harmless against claims by employes of the express company for negligence of the railroad company. pp. 203, 204.

**SAME.—Release of Liability for Injuries Sustained by Servant.**—A release by an employe of an express company of all liability for injuries sustained by the negligence of the employer "or otherwise," includes the liability of the express company to hold a railroad company, with which it does business, harmless against claims by employes of the express company for injuries, and precludes an action against the railroad company for causing his death, by suddenly closing the opening between parts of a train while he was passing between them in discharge of his duty as employe of such express company. pp. 204-206.

**APPEAL AND ERROR.—Motion to Modify Mandate.**—A motion to modify a mandate is in the nature of a petition for a rehearing and may be filed during the time allowed for a rehearing, notwithstanding the other party has filed a waiver, and the opinion has been certified to the court below. p. 207.

**SAME.—Motion to Modify Mandate.—Judgment on Reversal.**—Where a judgment is reversed on account of error of the court below in striking from answers certain contracts filed as exhibits thereof, the court will not sustain a motion to modify the opinion so as to give defendant a judgment instead of a new trial. p. 208.

From the Howard Circuit Court. *Reversed.*

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*N. O. Ross, G. E. Ross and Bell & Purdum*, for appellant.

*F. Winter, M. Winfield, Kistler & Kistler, Fausler & Mahoney and Blacklidge & Shirley*, for appellee.

HACKNEY, J.—In December, 1894, Oscar P. J. Romick was an employe of the Adams Express Company, at the city of Logansport, caring for express matter entering and going from said city on the line of the appellant's railway. Between two and three o'clock on the morning of the 13th of said month, while passing from the south side of appellant's two parallel tracks, near the passenger depot, and from the express company's storeroom to the north side of said tracks, said Romick entered between two cars of a passenger train, separated by a space of from six to ten feet, just as additional cars were driven against those of one division of said train, and he was caught and crushed between said two cars. From his injuries he died, and the appellee, charging the appellant with negligence in driving in said additional cars without warning and without watchman at the point of the cut in the train, sued the appellant for damages.

The appellant's third answer to the complaint alleged a special contract between the appellant and said express company, whereby the former agreed to carry upon its passenger trains the express matter and messengers of the latter, said express company supplying its own servants, and handling the express matter by its own agents; that as a part of said special contract the express company agreed "to assume all risks of loss or damage that may arise out of, or result from its operations under this agreement, and to save and hold harmless" the railway company "against the same, and especially to protect" it "against claims that may be made upon it for loss or

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damage, either to the employes of the" express company "or the property in its charge, whether the loss may occur through the gross negligence of the" railway company "or its employes or otherwise." It was alleged also that between Romick and the express company existed the following contract: "Whereas O. P. J. Romick, the undersigned, has made application to be employed by the Adams Express Company as a servant of said company at a stipulated rate of compensation for his services, which rate said company is willing to pay only if the undersigned will assume all risks of said employment and release said company therefrom, as hereinafter set forth. Now, therefore, in consideration of such employment, to be given by said company and the compensation to be paid therefor, and in consideration of one dollar, lawful money of the United States, paid by the Adams Express Company to the undersigned, the receipt whereof is hereby acknowledged, the undersigned, for himself, his heirs, executors, administrators and assigns, hereby covenants and agrees that in no case shall said company be liable by reason of any act or negligence of its agents, servants, or employes, or any of them, or otherwise, causing any injury to his person or property or causing his death, while he shall remain in its employ, and he accepts said employment with full knowledge and notice of all the risks involved therein, which he assumes. And the undersigned hereby releases said company from any and all liability for and in respect of any such damage, injury or death, by reason of negligence or otherwise." Said contract was signed by said Romick, was duly attested and had appended thereto the following statement, made and sworn to by said Romick concurrently with said contracts:

"O. P. J. Romick, being duly sworn, says, that he is



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the individual who executed the foregoing release and contract. That he has read or heard read the same before execution, and understands that by signing such contract he has released the Adams Express Company, and all other carriers employed by it, from all liability to him for his death or personal injury, from any cause, whether negligence of either of said companies or their servants or agents, or otherwise." Upon motion of the appellee the trial court struck out said contracts as exhibits to said answer, and the allegations of the answer pertinent to said contracts; and thereafter sustained a demurrer to said answer, which answer, denuded of said allegations, was not more than an admission of the injuries, and a denial of negligence. These rulings are urged as error, and appellee's learned counsel concede in oral argument that if the language of the contracts is sufficiently direct and comprehensive to include a release, on his part, of a right of action for injuries from the appellant's negligence, said rulings were erroneous and the judgment should be reversed. It had been urged in the briefs for appellee that a contract of release from the results of negligence was void as against public policy, and the following authorities were cited in support of that proposition. *Roesner v. Hermann*, 8 Fed. 782; *Railway Co. v. Spangler*, 44 Ohio St. 471, 8 N. E. 467; *Western, etc., R. R. Co. v. Bishop*, 50 Ga. 465; *Kansas Pacific R. W. Co. v. Peavey*, 29 Kan. 169; *Johnson, Admr., v. Richmond, etc., R. R. Co.*, 86 Va. 975, 11 S. E. 829; *Louisville, etc., R. R. Co. v. Orr*, 91 Ala. 548, 8 South. 360; *Hissong v. Richmond, etc., R. R. Co.*, 91 Ala. 514, 8 South. 776; 2 Thompson on Neg. 1025; 1 Cent. Law J. 465; *Arnold v. Illinois Central R. R. Co.*, 83 Ill. 273; *Jacksonville, etc., R. W. Co. v. Southworth*, 135 Ill. 250, 25 N. E. 1093; *Purdy v. Rome, etc. R. R. Co.*, 125 N. Y. 209, 26 N.

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E. 255; *Maney v. Chicago, etc., R. R. Co.*, 49 Ill. App. 105; *Newport, etc., R. R. Co. v. Eifort*, 15 Ky. L. Rep. 600; *Runt v. Herring*, 21 N. Y. Supp. 244.

These authorities probably sustain the proposition stated when applied to exemption against negligence in the discharge of a public or *quasi* public duty, such as that owing by a common carrier to an ordinary shipper, passenger, or servant. In a recent decision of this court, however, that of *Louisville, etc., R. W. Co. v. Keefer*, 146 Ind. 21, we recognized the well established rule that railway companies, although public or common carriers, may contract as private carriers, such as that of transporting express matter for express companies as such matter is usually carried, and in that capacity may properly require exemption from liability for negligence as a condition to the obligation to carry. See, also, *Express Cases*, 117 U. S. 1; *Hosmer v. Old Colony R. R. Co.*, 156 Mass. 506, 31 N. E. 652; *Bates v. Old Colony R. R. Co.*, 147 Mass. 255, 17 N. E. 633; *Chicago, etc., R. W. Co. v. Wallace*, 66 Fed. 506, 30 L. R. A. 161; *Coup v. Wabash, etc., R. W. Co.*, 56 Mich. 111, 22 N. W. 215, 56 Am. Rep. 374; *Forepaugh v. Delaware, etc., R. W. Co.*, 128 Pa. 217, 5 L. R. A. 508, 18 Atl. 503; *Hartford Fire Ins. Co. v. Chicago, etc., R. W. Co.*, 70 Fed. 201, 17 C. C. A. 62, 30 L. R. A. 193; *Quimby v. Boston, etc., R. R. Co.*, 150 Mass. 365, 23 N. E. 205, 5 L. R. A. 846; *Muldoon v. Seattle, etc., R. W. Co.*, 10 Wash. 311, 38 Pac. 995; *Griswold v. New York, etc., R. R. Co.*, 53 Conn. 371, 4 Atl. 261.

Contracts of exemption from such liability have been upheld for many years in the courts of New York without regard to the distinction between exemptions from those duties arising from the obligations of common carriers and those which the carriers are not re-

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quired to perform, but may perform upon terms prescribed by them. In that state, however, impressed perhaps by the question of public policy, which in other states defeats contracts of exemption from the consequences of neglecting *quasi* public duties, it has been held that contracts of exemption must be strictly construed and with all presumptions indulged against an intention to exempt liabilities for negligence. Some of these cases are *Kenney v. New York, etc., R. R. Co.*, 125 N. Y. 422, 26 N. E. 626; *Brewer v. New York, etc., R. R. Co.*, 124 N. Y. 59, 11 L. R. A. 483, 26 N. E. 324; *Mynard v. Syracuse, etc., R. R. Co.*, 71 N. Y. 180.

In the early case of *Wells v. Steam Navigation Co.*, 2 N. Y. 204, it was held, however, that the right to contract for a restricted liability existed with reference to private carriers.

Learned counsel for the appellee insist that the rule of strict construction should be applied to the contracts before us, and that under the rule the contract between the Adams Express Company and the appellant is one of indemnity only; that the contract between Romick and the express company exempted only the express company, and extended but to the ordinary risks of the employment with that company not including the negligence of that company or of the appellant, and that in construing the contract between Romick and the express company the sworn statement of Romick should be cast out, because it does not contain his signature, and because it was not embodied in the contract. The only reason assigned in the motion for striking out the exhibits was that they were void as against public policy. This reason, upon the authorities we have cited, was not sufficient and should not have prevailed, but if the exhibits, for any other reason, should have been stricken out, the ruling

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was probably harmless. There was no separate specification in the motion directed to the verified statement of Romick, and it went out under the general motion. There is no contention that the exhibits should have been stricken out because not the basis of the answer, and, therefore, not properly capable of becoming a part of the answer by exhibit; nor is it claimed that they were immaterial to the answer upon the theory thereof. The latter claim could not be sustained under the rule recently announced in *Atkinson v. Wabash R. R. Co.*, 143 Ind. 501, where it was said that "It is settled that where averments or matter in a pleading are in any way material, they ought not to be struck out on motion, and the recognized test of their materiality is to inquire whether they tend to constitute a cause of action or defense; if they do they are not irrelevant and ought not to be suppressed." Citing authorities.

That the exhibits tended to constitute and to support a cause of defense, is without serious doubt; and, when we observe the character of attack made upon them in this court, their sufficiency to constitute a defense is the question, and not whether they tend to do so. In other words, the argument here is that which would apply to a demurrer, and has no place upon the motion. While regarding the ruling upon the motion as an error for which the judgment should be reversed, the force and effect of the contracts will necessarily arise upon another trial, and seems now to arise upon the appellant's motion for judgment on the special verdict, it having been found that Romick's only rights upon and about the tracks and right of way, on the occasion of his injury, were by the terms of said two contracts, not including the verified statement. In an interpretation of the language employed in the contracts we are to be controlled by the usual

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rules for the ascertainment of the intention of the parties, looking to the words in their ordinary meaning, and not by the rule of strict construction here insisted upon, and that adopted in New York, with reference to contracts restricting liability of common carriers.

As said in *Hartford Fire Ins. Co. v. Chicago, etc., R. W. Co.*, *supra*, "The burden is on the party who seeks to put a restraint upon the freedom of contracts to make it plainly and obviously clear that the contract is against public policy." We have held the contracts before us not against public policy, and we must, therefore, subject them to the same tests of interpretation that other lawful contracts should receive. As between the express company and the appellant, their contract saving the latter from liability for injuries to the former's servants could not, in its very nature, be more than an assumption or indemnity, as there could be no waiver of a right belonging to another standing independent of them. But it yet remains to determine whether Romick stood independent of the contract and the parties thereto. That contract, whether an assumption, indemnity, or waiver, included the demand sued upon in this case, for it covered a *claim for damage to an employe of the express company, alleged to have occurred through the negligence of the railroad company*, taking the very words of the clause, quoted above, from that contract. By the provisions of that contract the rights of the express company were fully measured. Its only right to be upon the tracks and right-of-way, through and by its servants, was by the provisions of that contract. Its license came only from the contract, and the appellee introduced the contract in evidence to show the right of his decedent to be upon the tracks. The express company, operating by servants, was present, on the oc-

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casion in question, by Romick, its agent. His rights were those of the express company, and could not be greater. He was there by the license given the express company, and he could not accept the license and reject the conditions upon which it was granted. It is said, however, that it does not appear from allegation or proof that he knew of the conditions upon which the license was given, and we are aware that it was decided in *Brewer v. New York, etc., R. W. Co., supra*, that the express agent must have notice of the contract of exemption to be bound thereby. But with what reason can it be said that the railroad company should have given notice to the employes of the express company of the particular provisions of the contract under which they were admitted upon and permitted to use the property of the railroad company? Since the contract is the basis of rights which he assumes and exercises, it should rather be said that he must inform himself of its provisions. Unlike the theory of the holdings in New York, our court holds such contracts as standing, not upon the relationship of a common carrier, but as existing only in the private agreements of the parties. Therefore, when Romick took employment with the express company, he was obliged to know that his rights and privileges did not depend upon the law as to common carriers, nor upon public or *quasi* public duty of the railroad company, but that they rested upon private contract, to which he became subject in the performance of his duties for the express company in its relations to the appellant. He did not, therefore, occupy a position with relation to the railroad company independent of the contract between said two companies, but was chargeable with knowledge of the limitation upon the appellant's liability.

If we accept the construction of the contract be-

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tween the companies that it was an assumption or an indemnity which supplied a liability to the appellant for any claim it might be required to pay on account of an injury inflicted, and we then look to the contract between Romick and the express company, we find that he there assumed all the risks of the employment, released the express company from any and all liability on account of his injury or death from negligence or otherwise, and agreed that in no case should the express company be liable for his death or injury from any act or negligence of any agent, servant, or employe of such company, or otherwise. While it is not clear that the words "agents, servants, or employes," used in this contract, related directly to the appellant, since it was but in a limited sense an "agent, servant, or employe" of the express company, yet, when we have charged the decedent with notice of the contract between the two companies, creating an obligation on the part of the express company to pay for the injury or death of its employes, the last clause in his contract is more than a general restatement of what is particularly stated before. He "released said company from any and all liability for and in respect of any such damage, injury, or death, by reason of negligence or otherwise." The words "such damage, injury, or death" refer to the stated damage to property, injury to person or to his death, but they are not confined to the special negligence previously stated, but to negligence generally or otherwise. The word "otherwise" includes such liability as might arise from any other cause or in any different manner. A contract assuming or releasing the employer from the ordinary risks of a service would be a useless ceremony, for it could but do that which the law does without it. Giving the parties credit for a purpose to create an effective and rational

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contract, we would naturally look for a purpose not already accomplished, and when we consider the two contracts before us in the light of such an object or purpose we gather strength in the conclusion that the parties were contracting against unusual risks and liabilities. The word "otherwise," as it is twice employed in Romick's contract, must be deemed to include some liability not expressly mentioned or such as might arise out of the relations of the parties and within the general scope of his service and connection with them. Giving the word such force, it would reach liabilities beyond those expressly mentioned, and beyond those claims for damages, injuries, or death arising from the ordinary hazards of the service, for such claims present no liability. It would include "all the risks involved," ordinary, as well as extraordinary; and it would include the assumption by the express company in favor of the appellant. So that to treat the contract with the railroad company as a release, accepted by the decedent, and acted upon, or as an assumption or indemnity, the decedent, by his contract, took the place of the express company, assumed its liability and released it from the same. Appellee's decedent could not collect for the death a sum which the decedent, by the terms of his contract, agreed to release and assume.

We do not understand that a statement under oath may not be an affidavit without the signature of the affiant. *Turpin v. Eagle Creek, etc., Gravel Road Co.*, 48 Ind. 45; *Bonnell v. Ray*, 71 Ind. 141; 1 Ency. Pl. and Pr., p. 354, and authorities there cited.

We offer no suggestion as to the effect of the statement, with proper allegations as to the construction of the contract in case of ambiguity, but its relevancy to the defense pleaded was such that it should not have been stricken out, but should have received con-



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struction upon demurrer. In view of the fact that the special verdict contains findings relative to the contracts which were not within the issues, we do not make any direction as to the motion for a *venire de novo*, and for judgment in favor of the appellant.

The judgment of the lower court is reversed, with instructions to overrule the appellee's motion to strike out parts of the answer.

#### ON MOTION TO MODIFY MANDATE.

HACKNEY, J.—On the 24th day of May, 1896, the appellee filed with the clerk of this court his waiver of the right to petition for a rehearing, and, on the same day, the clerk certified to the clerk of the lower court the opinion heretofore rendered in this cause. On the 28th day of the same month the appellant filed its motion herein so to modify the mandate heretofore entered in this cause as to direct a judgment in its favor. To the latter motion the appellee enters a special appearance, and moves to dismiss the same, because, first, the opinion has been so certified down, and, second, because of the absence of merit in the motion.

Under section 674, Burns' R. S. 1894, and rule thirty-seven of this court, jurisdiction is retained in this court for sixty days from the adjudication of a cause to entertain the petition for a rehearing by either party, and this right to be further heard cannot be defeated as to one of the parties by a waiver filed by or on behalf of another. The motion to modify a mandate entered by this court in a cause, is in the nature of a petition for a rehearing, and may, at least during the time allowed for a rehearing, be filed on behalf of a party who has not waived it. The appellee's motion to dismiss will, therefore, be overruled.

The appellant's motion should not be sustained for the reason that the error upon which the reversal was made primarily was that the court below had stricken from the answer certain contracts, which were thereby taken out of the issues. But for that ruling a reply and additional evidence might have presented the case in different form. That ruling was the evidence that the trial court, from the time the ruling was made, proceeded upon an erroneous theory.

While we have construed the contracts in the light in which they were presented by the record, we feel that with an error committed so early in the case, and that error followed throughout, it would be prejudicial to the rights of the appellee to deny him an opportunity to plead to either of such contracts when answered by the appellant.

**The motion to modify is overruled.**

[No. 18,241. Filed June 10, 1897.]

**ELECTIONS.—Contests.—Municipal Elections.—Right of Appeal.—Statutes Construed.**—Construing section 6323, Burns' R. S. 1894 (4767, R. S. 1881), providing that all contests for municipal offices shall be tried in the manner provided by law for the contest of county and township offices, with section 644, Burns' R. S. 1894 (632, R. S. 1881), providing generally for appeals from the circuit courts to this court, an appeal will lie from the circuit court from contested municipal elections, notwithstanding no right of appeal is specially granted in such cases under the former statute. *pp. 211-213.*

**APPEAL AND ERROR.**—*Longhand Manuscript of Evidence.*—*How Made Part of Record.*—*Act of 1897 Construed.*—Under the act of March 8, 1897 (Acts of 1897, p. 244), the record need not show that the longhand manuscript of the evidence was filed in the clerk's office before it was incorporated in the bill of exceptions, but the evidence is properly in the record where the transcript contains the original bill of exceptions embracing the evidence and

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shows that the bill was presented to the judge within the time allowed by law and given by the court, and that it was signed by the judge and filed with the clerk. *pp. 213-215.*

**EVIDENCE.**—*Election Contests.—Mutilated Ballots.—Statute Construed.*—Under the provision of section 6248, Burns' R. S. 1894, of the election law, that all disputed ballots shall be preserved and all the remaining ballots be destroyed by the election officers at the completion of the count, by totally destroying the same with fire, evidence by the election officers as to the manner in which the destroyed ballots were marked, and for whom they were counted is incompetent in the trial of a contested election case. *pp. 215-219.*

**VENUE.**—*Change Of.—Special Proceeding.—Statute Construed.*—It is error to refuse to grant a change of venue from the county in a contested election case where application therefor has been properly made under the third specification of section 416, Burns' R. S. 1894 (412, R. S. 1881). *pp. 219-221.*

From the Shelby Circuit Court. *Reversed.*

*T. B. Adams, Isaac Carter, D. L. Wilson and W. A. Yarling, for appellant.*

*L. F. Wilson, D. H. Thompson, A. F. Wray, T. H. Campbell, K. M. Hord and E. K. Adams, for appellee.*

HOWARD, J.—At the regular election, held May 5, 1896, in the city of Shelbyville, as duly certified to by the board of canvassers of said election, at their meeting held May 6, 1896, it appears that 652 votes were cast and counted for the several candidates for councilmen of the fourth ward of said city, of which votes the appellant received 307, the appellee 305, and a third candidate 40; and thereupon the said board of canvassers declared the appellant duly elected to said office.

On the same day, in accordance with the provisions of section 6323, Burns' R. S. 1894 (4767, R. S. 1881), the appellee filed in the office of the clerk of the Shelby Circuit Court his complaint against the appellant for a contest of said election.

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A change of venue being taken from the regular judge, the special judge below was appointed to try the cause. On hearing the evidence, the court found that eleven ballots with distinguishing marks had been counted for said candidates, of which defective ballots seven had been counted for the appellant, three for the appellee, and one for the third candidate. Deducting the defective ballots so cast and counted for the several candidates, the court found that the appellee had a plurality of two votes, and declared him elected.

The alleged defective ballots were all cast in the third precinct of the ward; and no other irregularity is charged to have occurred at the election.

In the third precinct the appellant received and had counted for him 123 votes, the appellee 116, and the third candidate 21; while two mutilated ballots were not counted for any one, but were sealed up and preserved as required by law. No question is made as to those two mutilated ballots. Of the eleven alleged defective ballots which were counted, none were protested, but all were placed with the other ballots which had been counted for the candidates, and, together with such ballots so counted, were destroyed, as provided by statute in case of ballots counted and undisputed and not protested.

Many errors are assigned on this appeal, but only that relating to the overruling of the motion for a new trial is discussed by counsel. At the outset, however, we are met with some contentions by appellee which must first be considered.

It is contended that we have no jurisdiction of this appeal, for the reason, as urged, that the statute above cited, and being the only one under which provision is made for contests for municipal offices, does not give the right of appeal from decisions of circuit courts in such contests.

Previous to 1881 there was no statute providing for contests for municipal offices; and the only mode of questioning the validity of the election of a city officer was by an information in the nature of a *quo warranto*. *Gass v. State*, 34 Ind. 425.

By the act of May 4, 1852, concerning election contests (1 R. S. 1852, p. 269; 1 Gavin & Hord, p. 316; 1 Davis, R. S. 1876, p. 448), provision was made for contests for county and township offices before the board of county commissioners, with the right of appeal to the circuit court, "as from other decisions of such board;" and by an act approved March 2, 1859 (Acts 1859, p. 35; 1 Gavin & Hord, p. 319; 1 Davis, R. S. 1876, p. 451), a further appeal was allowed in such cases to the Supreme Court, "as in other civil cases."

Those statutes were substantially re-enacted in the act concerning elections and the contests thereof, approved April 21, 1881, Acts 1881, p. 498, sections 6299-6324, Burns' R. S. 1894 (4743-4768, R. S. 1881); and there was added, in section 90 of said act, the provision for contesting municipal offices under which the action in the case at bar was brought. This section reads as follows:

"All contests for municipal offices shall be tried before the circuit court of the proper county in the manner provided by law for the contest of county and township offices. The clerk of the circuit court shall be the person with whom the notice of contest shall be filed, and he shall perform all the duties required to be performed by him and the auditor in other cases, and the contest shall be set down for trial at the next term of such circuit court."

It thus appears that contests for municipal offices are to be tried "in the manner provided by law for the contest of county and township offices." This section having been introduced into the act long in force for

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the contest of county and township offices, and it being expressly provided that the contest as to municipal offices should be tried in the same manner as in the case of county and township offices, it would seem to follow that all the incidents of the contest should be as near alike in both cases as might be. This would appear to include whatever relates to pleadings, notice, motions, change of venue, new trial, exceptions, appeal, and anything else that may be deemed necessary to secure a fair and impartial determination of the rights of the parties.

While the right of appeal to this court in municipal election contests does not seem to have been heretofore called in question or expressly passed upon, yet, in *Gimbel v. Green*, 134 Ind. 628, such an appeal was entertained by the court, jurisdiction assumed and the case decided.

Before the enactment of the statute under consideration, the right to hold a municipal office might, as we have seen, have been determined by *quo warranto* proceedings, and in such action there might have been an appeal taken to this court. In extending the remedy by contest to the determination of the right to hold such offices, it is not to be presumed that the legislature intended to lessen rather than enlarge the scope of the remedy that already existed. A statute will not, in general, be so interpreted, unless its words will admit of no other meaning, as to impair rights already existing. *Bruce v. Schuyler*, 4 Gilman 221, 46 Am. Dec. 447. Unless, therefore, it is expressly, or by necessary implication, provided in a statute that there shall be no right of appeal from a final judgment of the circuit court such right should be presumed to exist.

In section 4322, Burns' R. S. 1894 (3301, R. S. 1881), it is provided, among other things, that the final order of the board of county commissioners declaring

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that a town has been incorporated "shall be conclusive of such incorporation" in all courts and places in this state; and it was at first accordingly held in many cases that there could be no appeal from such an order. But in *Grusenmeyer v. City of Logansport*, 76 Ind. 549, those decisions were overruled, and it was held that, since, by section 7859, Burns' R. S. 1894 (5772, R. S. 1881), appeals from decisions of county boards generally are provided for, those two statutes should be read together, and that an appeal would therefore lie from an order of the board declaring that a town has been incorporated, inasmuch as the general act provides for the appeal and the special act does not, either "expressly or by necessary implication," deny such right of appeal; and this is still the rule.

There is in the statute under consideration no express denial of the right of appeal from the circuit court to this court, while the implication, instead of being against such right, is, as we have seen, strongly in its favor. But the general statute concerning appeals from the circuit court to this court, section 644, Burns' R. S. 1894 (632, R. S. 1881), provides that "Appeals may be taken from the circuit courts and superior courts to the Supreme Court, by either party, from all final judgments," except in certain actions originating before a justice of the peace. These two statutes should also be read together; and as the statute providing for municipal election contests does not, either "expressly or by necessary implication" deny the right of appeal from the final judgment of the circuit court in such a contest, it should be held also that, under the general statute, the appeal will lie.

It is also contended by appellee that no question arises in this case as to any matter requiring an ex-

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amination of the evidence, for the reason that the bill of exceptions containing the evidence is not in the record. This contention is based upon the fact that it appears that the bill of exceptions and the longhand manuscript of the evidence were both filed in the clerk's office on the 21st day of April, 1897, but that it does not appear whether the longhand manuscript was so filed before it was incorporated in the bill. This objection would undoubtedly have been fatal to the validity of the bill of exceptions under the law as it formerly stood. *Smith v. State*, 145 Ind. 176; *Beatty v. Miller*, 146 Ind. 231.

The record on this appeal, however, was filed in this court April 23, 1897; while on March 8, 1897, an act was approved which greatly simplifies the manner of bringing up the evidence on appeal. Acts 1897, p. 244. That act was in force from and after its passage, and was therefore the law upon the subject before the case at bar was filed or pending on appeal in this court.

The first section of the act, omitting the enacting clause, reads as follows: "That to make the evidence, and all rulings of the court in respect to the admission and rejection of evidence and the competency of witnesses and the objections and exceptions thereto in any civil or criminal cause a part of the record upon appeal to the Supreme or Appellate Court, it shall be sufficient if the transcript contain the original bill of exceptions embracing all such evidence; including that which is oral, documentary, and by deposition offered and heard in such cause; and all such rulings, objections, and exceptions: *Provided, however,* That it shall appear from the record that such bill was presented to the proper judge of the trial court for settlement and signature within the time permitted by law and that allowed by the court, and that the same was signed by the judge and filed with the clerk of said



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trial court or in open court. And it is hereby made the duty of the clerk of any trial court, when requested to do so by the party appealing, to embrace in the transcript such original bill of exceptions instead of a copy thereof: *Provided*, That the provisions of this act shall not apply to cases now pending on appeal in the Supreme or Appellate Court."

The transcript in the case at bar contains the original bill of exceptions embracing the evidence. The court entry preceding and introducing the bill, shows that the bill was presented to the judge within the time permitted by law and that allowed by the court, and that it was signed by the judge and filed with the clerk. We are of opinion that this is a full compliance with the foregoing statute, prescribing the manner in which the evidence may be made a part of the record on appeal to this court. It is immaterial in what form or by whom the evidence is written, provided only it is embraced and certified to in a proper bill of exceptions.

The main contentions urged by appellant in favor of a reversal of the judgment are: (1) That the court erred in overruling the motion for a change of venue from the county, and (2) that it also erred in permitting the election officers to testify as to the markings on the eleven defective ballots that were counted and then destroyed without protest, and in permitting said officers to testify for whom such defective ballots were cast and counted. We shall consider this latter objection first.

It was alleged in the first paragraph of the complaint, upon which paragraph the finding and judgment rest, that certain ballots, having distinguishing marks, and sufficient in number to change the result of the election, had been wrongfully canvassed and counted for the appellant; and that the particulars of

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such markings could not be fully given for the reason that said ballots so counted had been destroyed by said election officers.

This is the first time, so far as we can learn, that this question has been before the court. The appeals heretofore, under the Australian ballot law, have been regarding the counting of marked ballots that had been protested and preserved, and not as to markings on ballots that had been counted without protest and then destroyed.

When, on the trial, objection was first made to the giving of evidence by the election officers as to how the destroyed ballots had been marked, and for whom they had been counted, the objection was sustained by the court, the judge saying, in substance: "I understand the object intended by the legislature in framing the law was, that the record made by the election officers, in counting the ballots, should be conclusive, except where protests are made and exceptions and objections properly taken, and evidence thus preserved which may be brought forward in any tribunal for the purpose of investigating the election. But it is provided that the ballots counted are to be destroyed. If it was intended that evidence should be introduced as to how those ballots were voted, the ballots themselves would be the best evidence and they would be preserved; but that was not the intention of the law. The officers were to make a record then and there, and that should be conclusive, except as I have stated."

We think the court thus properly stated the object of the law; and that it was error afterwards to have admitted the evidence objected to. The tally sheets and certificates of the election officers are made a conclusive record as to how the undisputed ballots were cast and counted, and that they were legally so

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cast and counted. But, to guard against the possibility of error in counting illegal, or in failing to count legal, ballots, wherever there is question of mutilation or distinguishing marks, it is provided that on protest, such ballots shall be preserved for future examination.

The provision governing in such case is found in section 52 of the general election law, as amended by the act of March 6, 1891 (Acts 1891, p. 124, section 6248, Burns' R. S. 1894), and is as follows: "In the canvass of the votes any ballot which is not endorsed with the initials of the poll clerks, as provided in this act, and any ballot which shall bear any distinguishing mark or mutilation shall be void and shall not be counted, and any ballot or part of a ballot from which it is impossible to determine the elector's choice of candidates, shall not be counted as to the candidate or candidates affected thereby: *Provided, however,* That on protest of any member of the board such ballot, and all disputed ballots shall be preserved by the inspector, and at the close of the count placed with the seals of the ballot packages in paper bags, securely sealed, and so delivered to the clerk of the county with notification to him of the number of ballots so placed in such bags, and of the condition of the seals of the ballot packages. The poll clerk shall also record on the tally sheets, memoranda of such ballots and the condition of the seal of the ballot packages, and in any contest of election such ballots and seals may be submitted in evidence. On completing the count and recording the same on the tally sheets, all the remaining ballots, except those marked, mutilated, or otherwise defective, as in this section hereinbefore described, shall be destroyed by the election board by totally consuming by fire before adjournment, and thereupon the election board shall immediately make

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a memorandum of the total vote cast for each candidate and deliver a copy thereof to each member of such board."

The intention of the law is here clearly manifested, as we think. It is, that all undisputed, unprotested ballots shall be destroyed before the adjournment of the election board. The words relating to their destruction are most emphatic, that they shall be destroyed "by totally consuming by fire," as if it were the determination of the law-making body that no vestige whatever of such ballots or of their appearance should by any possibility be left, but that the record of them made by the election board should be conclusive as to their legal form and as to the candidates for whom they had been voted and counted.

As to protested ballots, however, the very best evidence is provided by the legislature, to show both for whom they were voted and what were the mutilations or distinguishing marks, if any, upon them; and that evidence is the ballots themselves. As the judge of the trial court well said, if it had been the intention of the legislature that any evidence should ever be given as to those ballots which had been counted without protest from any member of the election board, it would never have been provided that such ballots, showing on their face, and without the possibility of a doubt, how they had been voted and what marks, if any, were upon them, should be destroyed. The best evidence would thus have been totally consumed by fire; and in place of such evidence, the court would be compelled to determine, as best it could, from the uncertain memory of one or more members or clerks of the election board, weeks or months afterwards, how such ballots had been voted and whether or not the markings, if any, were such as to make the ballots or any of them illegal.

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It was and is the policy of the Australian ballot law, as we believe, to prevent forever any tampering with or dispute about ballots that had been cast and counted without protest or objection from any member of the election board. To secure such protest whenever it ought to be made, it is provided that the political friends of the two candidates, either of whom is morally certain to be elected, shall both be represented on the board. If it be urged that all the members of the board might be ignorant of the law, or careless of their duty, it is to be answered that these were and still are matters for the consideration of the legislature. That body deemed the mode prescribed for conducting an election, and preserving evidence of its results, to be the best that could be devised for securing an honest vote and a faithful count. If, through human frailty, the method adopted should, in some instances, fail of its object, that is but to say that man and his methods are not perfect. It is, however, generally conceded by all the people of the State, as the result of years of experience, that our present ballot law, notwithstanding any objections that may be urged against it, is the best ever enacted and observed by a free people.

Although the judgment must be reversed for the reasons given, yet it may be better that we should also consider the remaining contention of appellant, that it was error to refuse a change of venue from the county.

The statute, section 416, Burns' R. S. 1894 (412, R. S. 1881), provides that "The court in term, or the judge thereof in vacation, shall change the venue of any civil action upon application of either party, made upon affidavit showing one or more of the following causes: \* \* \*

"Third. That the opposite party has an undue in-

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fluence over the citizens of the county, or that an odium attaches to the applicant, or to his cause of action or defense, on account of local prejudice."

The appellant made an affidavit in accordance with the foregoing provisions of the statute. The statute does not permit any showing by counter affidavits; and it has been held, without exception, that where, in a civil action, a motion for a change of venue is made in compliance with the statute, it is the imperative duty of the court to grant the change. *Route v. Ninde*, 118 Ind. 123.

But it is said that this is a special proceeding, and not a civil action; and that the statute under which the proceeding is brought does not provide for change of venue. In the early decisions there seems to have been a disposition to refuse changes of venue in all special proceedings, wherever the special statute giving the right of action did not provide for such change. But our later decisions have extended the general provisions of the code to such special proceedings, in so far as the particular statutes have not provided a different or inconsistent procedure of their own. Accordingly, whenever the question has been raised, changes of venue have been sanctioned in almost every proceeding, not especially affecting the privileges or rights of the court or those committed to its discretion, as in contempt proceedings or where the change is asked for on account of convenience of witnesses or the like.

Such right to a change of venue from the county has been recognized in proceedings to contest the validity of a will, *Rogers v. Howard*, 4 Ind. 325; on appeals in case of applications for liquor licenses, *State v. Vierling*, 33 Ind. 99; in bastardy proceedings, *Saint v. State*, 68 Ind. 128 (though it was held in one case that the relatrix in bastardy, not being a party, but a witness

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only, could not have such change, *State v. Smith*, 55 Ind. 385; claims against decedents' estates, *Lester v. Lester*, 70 Ind. 201; suretyship, *Williams v. Fleenor*, 77 Ind. 36; proceedings supplementary to execution, *Burket v. Bowen*, 104 Ind. 184; divorce, *Evans v. Evans*, 105 Ind. 204; drainage, *Bass v. Elliott*, 105 Ind. 517; guardianship, *Berry v. Berry*, 147 Ind. 176.

Following the reasoning and analogy of those cases, we are of opinion that the change of venue asked for in this case should have been granted.

The judgment is reversed, with instructions to grant a new trial.

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THE STATE v. FIDLER.

[No. 18,165. Filed June 11, 1897.]

CRIMINAL LAW.—*Indictment.—Duplicity.*—Where a statute makes it a crime to do any one of several things mentioned disjunctively, all of which are punishable alike, the whole may be charged conjunctively in a single count without objection for duplicity.

148	221
154	428
156	636
148	221
161	671

148	221
1170	539

From the Tippecanoe Circuit Court. *Reversed.*

*W. A. Ketcham*, Attorney-General, *Merrill Moores*,  
*C. E. Thompson* and *D. E. Storms*, for State.

*R. P. De Hart* and *Kumler & Gaylord*, for appellee.

HACKNEY, J.—The indictment herein charged that the appellee at, etc., “did \* \* \* falsely, fraudulently and feloniously make, forge, counterfeit, and utter a certain promissory note \* \* \* with intent then and there and thereby to feloniously, falsely, and fraudulently defraud,” etc. The lower court sustained the appellee’s motion to quash the indictment upon the contention that two distinct offenses were charged, namely, forging a promissory note, and uttering a forged promissory note.

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The statute, section 2354, Burns' R. S. 1894, provides that "Whoever falsely makes or assists to make, defaces, destroys, alters, forges, counterfeits, \* \* \* any record \* \* \* promissory note \* \* \* or any other instrument of writing with intent to defraud any person, body politic or corporate; or utters or publishes as true any such instrument, \* \* \* knowing the same to be false," etc., "with intent to defraud any person, body politic or corporate—shall be imprisoned in the state prison," etc.

It will be observed that under this statute any one of numerous separate and distinct acts will constitute the crime against which a single punishment is provided. Under former statutes any of the enumerated acts, including that of uttering a forged note, constituted the crime defined as forgery, but, under the present revision, in the economy of words, the crime constituted by the commission of any of the acts enumerated, is not named. Intent to defraud is now and always has been of the essence of the offense sought to be restrained, and any of the acts enumerated, if committed with that intent, is forgery. The rule in this State and elsewhere is that when a statute makes it a crime to do any one of several things mentioned disjunctively, all of which are punished alike, the whole may be charged conjunctively in a single count without objection for duplicity. *State v. Sarlls*, 135 Ind. 195; *Hobbs v. State*, 133 Ind. 404; *Marshall v. State*, 123 Ind. 128; *State v. Stout*, 112 Ind. 245; *Mergentheim v. State*, 107 Ind. 567; *Fahnestock v. State*, 102 Ind. 156; *People v. Leyshon*, 108 Cal. 440, 41 Pac. 480; *Sprouse v. Commonwealth*, 81 Va. 374, *State v. Murphy*, 17 R. I. 698, 24 Atl. 473; *Crain v. United States*, 162 U. S. 625; *People v. Altman*, 147 N. Y. 473; *Rex v. Horne*, Cowp. 672.

In the case of *People v. Leyshon*, *supra*, under a stat-



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ute similar to that quoted above, the indictment charged the forging of a promissory note on one day, and the uttering thereof on the next day, and the court held it not bad for duplicity, invoking the rule above stated.

In *People v. Altman*, *supra*, under a like statute, the indictment, which charged the forgery of a check, an endorsement thereof, and an offering of the same for goods purchased, it was held to charge but one offense and referred to but one transaction.

In *Sprouse v. Commonwealth*, *supra*, the indictment charged the forgery of a check and of an endorsement thereof, and it was held that as the two acts were part of one endeavor, one transaction, the charge was not double. Of a like character is *Rex v. Bowen*, 1 Denison Crown Cases, 23.

In *Rex v. Horne*, *supra*, it was held proper to charge in one count the writing, publishing, and causing to be published a libel, the doing of any one of which acts constituted the offense of libel.

While the cases specially noticed might support the proposition that separate and distinct acts of forging and uttering might be charged in one count without duplicity, and admit of conviction upon proof of either act, we are not here required so to decide. Here the charge appears to have been of one endeavor, a continuous transaction to defraud the party to whom the utterance was made. There is no allegation of knowledge of the forgery, but, accepting the contention of the appellee that the allegations that he forged the note were equivalent to a charge of knowledge, the burden of the charge would then rest in the efforts to defraud by the utterance of the forged note.

The judgment of the lower court is reversed with instructions to overrule the appellee's motion to quash the indictment.

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 Hoefgen v. Harness *et al.*


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148	224
160	537

148	224
1171	463

## HOEFGEN v. HARNESS' ET AL.

[No. 18,258. Filed June 11, 1897.]

**DRAINS.—Assessment of Damages.—Intervening Petition by Landowner.—Statute Construed.**—An intervening petition, seeking an allowance for damages resulting from the construction of a drain, filed nearly three years after such drain had been established, and nearly two years after the drainage commissioner had reported that the drain was partially completed, is properly stricken from the files, under the provisions of section 5625, Burns' R. S. 1894, where it is shown that such petitioner was duly notified of the proceedings at the time the drain was established. *pp. 225-229.*

**SAME.—Remonstrance.**—One who fails to remonstrate against the construction of a drain, as provided by section 5625, Burns' R. S. 1894, is as much barred by the judgment as if he had remonstrated and been defeated. *p. 229.*

From the Marion Circuit Court. *Affirmed.*

*J. H. Blair*, for appellant.

*A. W. Wishard* and *Blackledge & Thornton*, for appellees.

**MCCABE, C. J.**—A part of the appellees were the petitioners in the circuit court for the construction of a certain drain in Marion county, under the act approved April 6, 1885, providing for the institution of proceedings in the circuit court for the construction of such drains.

The petition was referred to the drainage commissioners. Due notice was given of the docketing of the petition, and within the time provided, the court ordered the same placed on the docket of said court as an action pending. The court referred the same to the drainage commissioners. Said drainage commissioners met at the time and place ordered and fixed

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*Hoefgen v. Harness et al.*

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by the court, and considered the matters required of them by the statute, among which was, they estimated the costs thereof, and assessed the benefits and injury to each separate tract of land to be affected thereby, and made their report as directed under oath to the court. Remonstrances were filed, and such remonstrances were all acted upon, and after the ten days allowed for filing such remonstrances had elapsed, there was a final order made and entered, declaring the proposed work established, and approving the assessments of damages and benefits by the commissioners, and the court assigned the work to a commissioner for construction. He afterwards, pursuant to said order, entered into contracts for the construction of the work.

Nearly three years after the drain had been established and nearly two years after the drainage commissioner had reported that the drain was partially completed, and after the drain had been completed, the appellant filed what her counsel calls an intervening petition asking for an allowance for damages done to her land, alleging therein that the drain as it turned out did not benefit her lands any, and that it damaged it in a large amount. It is not denied that she was duly notified of the proceeding, and had had her day in court; but it is alleged that at that time she was unable to discover that the proposed drain would not only not benefit her land, but on the contrary would cause great injury thereto.

The circuit court sustained the appellees' motion to strike said petition from the files. This action of the circuit court is called in question by the assignment of errors as the only alleged error complained of.

It is contended by the appellees in support of the ruling of the trial court, that the so-called interven-

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*Hoefgen v. Harness et al.*

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ing petition is a collateral attack upon a judgment of a court of competent jurisdiction over the subject-matter and the parties, and hence it was, as they contend, proper to strike it from the files. On the other hand it is contended on behalf of the appellant, that this court has decided in several cases that the drainage act referred to contemplates that further proceedings, upon notice being given, may be had in a drainage case, after judgment of the court establishing the drain and approving the assessments has been rendered. One of the cases cited in support of this contention is *Perkins v. Hayward*, 132 Ind. 95. After the judgment establishing the drain and confirming the assessments of damages and benefits the appellants in that case moved the court, among other things, "to set aside, vacate, and annul the judgment heretofore rendered herein, \* \* \* establishing the drain prayed for in the petition herein, and approving the assessments made by the commissioners, and appointing John Price drainage commissioner to construct said work, for the reason that it appears by the petition, that it is proposed herein to construct a drain to lower and drain certain of the fresh water lakes of the counties of Steuben and LaGrange; that such is one of the objects and purposes, and that this court has no jurisdiction thereof, nor any authority of law to proceed further therein." This motion was overruled, and this court in support of that ruling said: "The drainage law, under which these proceedings were had, contemplates that after judgment has been rendered by the court establishing a ditch and ordering its construction, the case shall still remain upon the docket of the court while the ditch is in progress of construction. The ditch commissioner, to whose supervision the work is entrusted, acts throughout under the direction of the court. \* \* \*

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Hoefgen v. Harness *et al.*

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Only when he reports, showing the work done, does it finally disappear from the docket. It does not follow, however, that the entire proceeding is *in fieri* during all this time. The statute contemplates adversary proceedings. Provision is made for bringing before the court all persons interested in or affected by the work. Issues may be formed and tried, as was done in this case. But the judgment, establishing the ditch and ordering its construction, is a final judgment, which terminates the adversary proceedings. It is, thereafter, on the docket only for the purpose of carrying into effect the judgment actually rendered, and not for any action modifying or changing that judgment."

This decision is as clearly against appellant as it can be. If the judgment establishing the ditch and ordering its construction is a final judgment which terminates the adversary proceedings, certainly thereafter there can be no assessment of benefits or damages, for such assessments belong to the adversary part of the proceedings. If it remains on the docket only for the purpose of carrying into effect the judgment actually rendered, and not for any action of modifying or changing that judgment, then the case was not on the docket for the purpose of awarding damages to the owners of the land through which the drain passes and who had had their day in court. It is provided in the third section of the act (section 5624, Burns' R. S. 1894) that the drainage commissioners to whom the court refers the petition "shall make personal inspection of the lands described in the petition, and all other lands likely to be affected by the proposed work; and consider: *First*, whether the drainage proposed is practicable; *second*, whether, when accomplished, it will improve the public health or benefit any public highway in the county or streets of a town

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or city, or be of public utility; and, *third*, whether the costs, damages and expenses of effecting the drainage will be less than the benefits to the owners of the lands likely to be benefited by the proposed drainage. If they find any of these inquiries in the negative, they shall make report of such finding to the court, and thereupon the petition shall be dismissed at the cost of the petitioners. But if they find otherwise, they shall proceed and definitely determine," and among other things, "estimate the cost thereof, \* \* \* and \* \* \* assess the benefits or injury as the case may be to each separate tract of land to be affected thereby \* \* \* and make report to the court as directed under oath."

The next section provides among other things, that persons whose lands are assessed as benefited may remonstrate, among other reasons, on the ground that their lands are assessed too much as compared with other lands assessed as benefited or damaged, that other tracts specifying the same are assessed too low according to the benefits likely to be received; and by any person whose lands are assessed as benefited, that the same will not be affected, nor benefited to the extent of the assessment by the proposed work if accomplished; by any person whose lands are assessed as damaged, that the damages assessed are inadequate, and by any person whose lands are reported as benefited, that his lands will be damaged by the construction of the proposed work. It is further provided in the same section, among other things, that: "If the finding and judgment of the court be against the remonstrance or remonstrances, \* \* \* the assessments made by the commissioners shall be confirmed and the order of confirming shall be final and conclusive."

If it were not so provided then at any and all times

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Hoefgen v. Harness *et al.*

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the subject of benefits and damages would be open to constant change as to the cost of construction, and such changes might result in establishing that the damages exceeded the benefits and thus defeat the work, or rather defeat all assessments after the work had been practically completed.

There was, therefore, not only sound reason for the holding in the case from which we have quoted above, to the effect the case only remains on the docket for the purpose of carrying into effect the judgment rendered and not for any action modifying or changing that judgment, but the statute makes it imperative on the court so to hold.

Because, if the action invoked by the so-called intervening petition can be taken, the whole judgment may be defeated in the way above indicated.

The whole statute forbids such a construction.

But it is contended that the appellant filed no remonstrance, and, hence, the matters she now seeks to litigate have never been litigated.

A remonstrance as provided for in the statute is in the nature of a defense, and it is settled that a defense which a party might have made, and did not make or present until after judgment, is as much barred by the judgment as if he had made it and been defeated. *Ballard v. Franklin Life Ins. Co.*, 81 Ind. 239; *Fischli v. Fischli*, 1 Blackf. 360; *Griffin v. Hodshire*, 119 Ind. 235.

In the latter case it was said at page 243 that: "Where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect to matter which might have been brought for-

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ward as a part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted a part of their case."

The meaning of which is that as long as the judgment stands they are concluded, and that under special circumstances in such cases they may be permitted to open up the subject of litigation.

It is not necessary to decide whether in such a case such a judgment can be opened up, because that was not what was asked for in the case now before us.

It was asked to go into the question of appellant's damages, and leaving the judgment to stand; her only excuse for not bringing that subject forward at the proper time to remonstrate, is that she could not then see that the proposed ditch would damage her land. She, however, is in no better condition than if she had remonstrated for damages and for want of benefits, and been defeated. Had she done so, she could not now come forward and file a new remonstrance on the ground that the drainage commissioners had made a mistake in failing to assess damages to her land. That is substantially what she is asking to do.

The court did not err in striking the petition from the files.

The judgment is affirmed.

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[No. 18,030. Filed Feb. 25, 1897. Rehearing denied June 11, 1897.]

148	230
151	137
148	230
155	693
148	230
151	124
148	230
155	176

JUDGMENTS.—*Setting Aside for Fraud.*—A judgment refusing to admit a will to probate will be set aside for fraud where the father of infant devisees, with the assistance of the attorney who wrote the will, satisfied the claims of all other persons interested, and then appeared in court as a contestant, and stated to the guardian *ad litem* for his minor children that it was an agreed case, and that all the parties were satisfied with the steps which were being



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taken, in reliance upon which such guardian filed only formal answer and gave no further attention to the case. pp. 532-534.

**ABATEMENT.**—*Action to Set Aside Judgment.—Death of Party, Who Is a Married Woman.*—An action by a married woman to set aside a judgment refusing to admit a will to probate, does not abate upon her death, and her administrator may be substituted as plaintiff. p. 235.

**PLEADING.**—*Action to Set Aside Judgment for Fraud.—Death of Plaintiff Who Was a Married Woman.—Parties.*—A husband and daughter of a devisee who dies after commencing an action to set aside, for fraud, a judgment refusing to admit the will to probate, have such an interest, as the heirs of such plaintiff, as make them proper parties plaintiff after her death. p. 235.

**COURT.**—*Discretion as to Amendment of Pleadings.*—The trial court has a wide discretion in the matter of amendments to pleadings, and unless it clearly appears that there was an abuse of discretion the Supreme Court will not interfere. p. 235.

**EVIDENCE.**—*Action to Set Aside Judgment.—Hearing by Court After Rendition of Judgment.*—Where in the trial of an action to set aside, for fraud, a judgment refusing to admit a will to probate, it is shown that, at the time the judgment refusing to admit the will to probate was rendered, the trial court was kept in ignorance of certain transactions now alleged to be fraudulent, evidence is not admissible to show that the court rendering the original judgment, and but a few days thereafter, and during the same term of court, called for more evidence, and, after being fully advised as to such transactions, permitted the judgment to stand. p. 237.

From the Bartholomew Circuit Court. *Affirmed.*

*M. D. Emig, Marshall Hacker and Charles F. Remy,*  
for appellant.

*George W. Cooper, C. B. Cooper, S. Stansifer, C. S. Baker and W. H. Everroad,* for appellees.

**MONKS, J.**—This action was brought by appellees against appellant to set aside, on account of the alleged fraud of appellant in procuring the same, a judgment of the Bartholomew Circuit Court refusing to admit to probate the last will and testament of Jeanette Burnett, deceased, and adjudging the same to be null and void. The cause was tried by the court, and there was a finding in favor of appellees, and over a motion

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for a new trial, judgment was rendered in favor of appellees setting aside said judgment.

The first error urged calls in question the action of the court in overruling the demurrer to the complaint. The allegations of the complaint supporting the charge of fraud in procuring the judgment which it is sought to set aside are substantially as follows:

Jeanette Burnett, Sr., a widow, having only one child and heir, William Burnett, the appellant, owned a large tract of land, and personal property to the amount of five thousand dollars, all of which she willed to her two little granddaughters, Jeanette and Nannie Burnett, aged fourteen and twelve years respectively, the children of her said son, except forty acres of land which she gave to Wm. H. Bush, and five hundred dollars which she gave to the Methodist church at Petersville. An attorney, in no way connected with this appeal, wrote the will, and at her request became a witness thereto; the other witness soon after attesting the will became a nonresident of the State, and has ever since been absent therefrom. On the death of the testatrix, appellant, the son, undertook to set aside this will, and did obtain a judgment of the Bartholomew Circuit Court annulling the same. The complaint charges that the judgment was obtained by fraud, and among other circumstances and details given, it charges that appellant first employed the attorney who wrote the will, and agreed to, and did, pay him \$1,000.00 to aid and assist him in getting rid of the will.

Among the things which the complaint charges were done by said attorney are these: That he counselled and advised and assisted the appellant in preparing his case for trial; that he aided the appellant in securing compromises with the said Bush and the trustees of said church, who were the only adult lega-

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tees in said will, for the purpose of keeping them out of court; that after compromising with and silencing them, the said attorney appeared in court and falsely represented to the court that he produced and deposited the said will as the representatives of the said Bush and the other legatees who had been compromised with, thereby making them the proponents of the will; that the appellant, in order to present to the court the appearance of an adversary proceeding, suppressed from the court the knowledge that said attorney who wrote and attested the will was his attorney, employed other attorneys, and procured them to file his objections to the probate of the will; that the adult defendants before mentioned were thereafter proceeded against adversely, regularly summoned and defaulted, precisely as if no compromise had been made with them; that when the case was called for trial a guardian *ad litem* was appointed for the two infant defendants who were then only twelve and fourteen years of age respectively; that the appellant informed the guardian *ad litem* that the defendants whom he was appointed to represent were appellant's own children, that it was an agreed case; that all the parties were satisfied with the steps that were about to be taken, and that the guardian *ad litem* relied upon these representations, filed a formal answer and gave no further attention to the case; that he was not present in court at the trial; that none of the adult legatees were present; no witnesses were subpoenaed or examined to sustain the will; that the said attorney, the only resident attesting witness to the will, refused to testify to the sanity of the testatrix; and that by the false testimony of the appellant, his father-in-law and brother-in-law, the will was set aside; that the employment by appellant of the attorney who wrote the will and attested it, and the

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compromises, by which the adult beneficiaries were silenced, were all kept from the knowledge of the court.

The facts here stated make a case of fraud upon the court and upon the rights of the infant defendants. *Loomer v. Wheelwright*, 3 Sandf. Ch. \*135; *Kirby v. Kirby*, 142 Ind. 419; *Ward v. Town of Southfield*, 102 N. Y. 287, 6 N. E. 660; *Verplanck v. VanBuren*, 76 N. Y. 247; *Graver v. Faurot*, 19 C. C. A. 680, 73 Fed. 1022; *Beach Modern Equity*, section 921; *Freeman on Judgment*, 491, 493 and 111a.

It is a case where appellant has paid or otherwise satisfied all persons interested in the probate of the will except his own children who are of tender years and are under his control. Bush and the trustees of the church have no further interest in the will or the probate thereof. The guardian *ad litem* for the children makes no defense for the reason alleged that appellant informed him that it was an agreed case, and that all parties were satisfied with the steps about to be taken to set aside said will. The attorney who wrote the will is one of the attesting witnesses, produces the will in open court for Bush and the other legatees have been paid one thousand dollars by appellant for merely nominal services in defeating the will. It is shown by the allegations of the complaint that appellant either directly or indirectly managed and controlled both sides of the case, and that the judge was imposed upon.

Under such circumstances, a final judgment, even in a criminal case, has been declared void. *Halloran v. State*, 80 Ind. 586; *Watkins v. State*, 68 Ind. 427; *State v. Green*, 16 Iowa 239; *Wharton's Crim. Prac. and Pl.*, section 451; 1 *Bishop Crim. Law*, section 1010.

The demurrer to the complaint was properly overruled.

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The next error urged is that the court erred in permitting appellees to file an amended complaint, over objection of appellant.

This action was commenced by Jeanette Milnes, who was a daughter of appellant and one of the legatees under said will, and her husband, Thomas C. Milnes. Afterwards, a rule was entered against appellant to answer the complaint. Before an answer was filed, Jeanette Milnes died intestate, and on suggestion of her death, her administrator was, by order of court, substituted as a party plaintiff. Thereupon, by leave of court, an amended and substituted complaint was filed by said administrator and the husband and daughter, the only heirs of said deceased.

The husband was a proper, but not a necessary, party in the original complaint. *Roller v. Blair*, 96 Ind. 203; *Atkinson v. Mott*, 102 Ind. 431.

The death of the wife did not cause the action to abate. Section 272, Burns' R. S. 1894. Appellant was in court to answer the cause of action set forth in the original complaint. The cause of action was not changed by the death of said plaintiff, and her administrator was properly substituted as a plaintiff, and the husband and daughter having an interest in the cause of action as her heirs were also proper parties plaintiff after her death.

It is well settled that the trial court has a wide discretion in the matter of amendments, and unless it clearly appears that there was an abuse of discretion, this court will not interfere. *Nysegander v. Lowman*, 124 Ind. 584.

There was no error, therefore, in permitting appellees to file the amended and substituted complaint. Neither did the court err in overruling the appellant's motion to quash the summons.

The fourth and fifth errors assigned are that the

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court erred in overruling motions to suppress parts of the deposition of certain witnesses, present no question, for the reason that they must first be specified as causes for a new trial, and have no place in an assignment of errors.

The seventh error assigned is that the court erred in overruling the motion for a new trial.

Specifications for a new trial numbered from five to sixteen inclusive, call in question the action of the court in permitting appellees to read in evidence parts of the depositions of certain witnesses. Appellant made no objection and reserved no exception to the reading of said depositions or any part thereof in evidence.

The record shows that appellant did make motions to suppress parts of two depositions which were overruled, but we cannot consider these rulings of the trial court for the reason that they have not been specified as causes for a new trial. *National Bank, etc., Co. v. Dunn*, 106 Ind. 110; *Hatton v. Jones*, 78 Ind. 466.

It is attempted by causes for a new trial numbered from seventeen to thirty-five inclusive, to present the question of the admissibility of certain testimony, but it is shown by the record, either that no objection was made to the introduction of the evidence, or if there was that no exception was reserved to the action of the court in permitting the same to be given. No question is therefore presented by such specifications for a new trial.

The alleged errors of the court specified in cause 17, 18, 19, 20, 22, 23, 27, 28, 29, 33, 36, and 37 for a new trial are waived by the failure on the part of appellant to point out in his brief the line and page where such rulings are shown. *Memphis & Cincinnati Packet Co. v. Pikey*, 142 Ind. 304; *Harness v. State, ex rel.*, 143 Ind. 420, 422.

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During the progress of the trial appellant offered to prove by certain witnesses that after the judgment declaring said will was void and refusing to admit the same to probate was rendered, some one met the judge who rendered said judgment on the street and informed him that appellant had before the will was offered for probate paid the trustees of the church the full amount of the legacy to said church and agreed to convey to Bush the forty acres of land devised to him, and that the court after the judgment was rendered, and at the same term of court, caused appellant to be recalled as a witness, and he testified that he had paid said legacy and agreed to convey said real estate.

The court properly excluded this evidence for the reason that after making the finding and rendering the judgment declaring said will was void and refusing to admit the same to probate, the trial court had no power or authority to hear evidence or take any steps therein except such as are proper after judgment, as granting a new trial on motion, etc. *Hartlepp v. Whitely, etc., Co.*, 131 Ind. 543; *Hartlepp v. Whiteley*, 129 Ind. 576; *La Follette v. Higgins*, 129 Ind. 412; *Clark v. State, ex rel.*, 125 Ind. 1; *Continental Ins. Co. v. Kyle*, 124 Ind. 132; *Sharp v. Malia*, 124 Ind. 407; *Levy v. Chittenden*, 120 Ind. 37, 41; *Wray v. Hill*, 85 Ind. 546; *Martindale v. Palmer*, 52 Ind. 411; *Wright v. Hawken*s, 36 Ind. 264.

If appellant procured the judgment by fraud, as alleged, he could not avoid the effect thereof by making a full disclosure of the facts to the court after said judgment was rendered and the power of the court over the same was at an end.

There is evidence which sustains the allegations of the complaint, and although there is some conflict, this court cannot interfere with the finding of the trial court.

Judgment affirmed.

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## HAUK v. THE STATE.

[No. 18,054. Filed Feb. 16, 1897. Rehearing denied June 11, 1897.]

**VENUE.—Change Of.—Criminal Law.—Discretion of Court.—Statute Construed.**—A change of venue in a criminal action, not punishable by death, under the provisions of section 1840, Burns' R. S. 1894 (1771, R. S. 1881), is left to the sound discretion of the trial court, and it must affirmatively appear that such discretion has been abused to the injury of the complaining party in order to secure a reversal on appeal. *p. 243.*

**CRIMINAL LAW.—Plea in Abatement.—Objection to Grand Jurors.**—No error was committed by the trial court in sustaining a demurrer to a plea in abatement, interposed by defendant in a criminal cause, on the grounds that the grand jurors who returned the indictment were prejudiced against defendant, such plea giving as an excuse for not interposing such objection by challenge before the grand jury was sworn as provided by section 1752, Burns' R. S. 1894 (1656, R. S. 1881), that at the time the grand jury was in session and when the indictment was returned defendant was in jail and had no opportunity to challenge said grand jury, where it is not shown that defendant was in jail at the time the grand jury was sworn or impaneled, or that he attempted in any way to avail himself of his right of challenge at the proper time. *pp. 244, 245.*

**JURISDICTION.—Criminal Law.—Where Offense is Committed Partly in One County and Partly in Another.—Abortion.—Statute Construed.**—Under the provision of section 1649, Burns' R. S. 1894 (1580, R. S. 1881), that "where a public offense has been committed partly in one county and partly in another, or the act or effects constituting or requisite to the consummation of the offense occur in two or more counties, the jurisdiction is in either county." a person charged with procuring an abortion may be indicted and tried in the county in which the woman miscarried and died, although the acts of defendant producing the miscarriage and death were done and committed in another county. *pp. 245-248.*

**INDICTMENT.—When not Bad for Duplicity.—Abortion.—Criminal Law.**—An indictment for abortion which charges both miscarriage and death is not bad for duplicity. *p. 248.*

**TRIAL.—Criminal Law.—Failure of Court to Require State to Elect Upon Which Count of Indictment it Would Ask for Conviction.**—No error was committed in not requiring the State to elect upon which count of an indictment it would ask for a conviction in the

148	238
149	404
152	72
158	291

148	238
153	381

148	238
154	351
156	238

148	238
157	385

148	238
160	471

148	238
161	294

148	238
169	242
169	434

148	238
171	70



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trial of a criminal cause, where the court withdrew all of the counts but one from the consideration of the jury, and submitted the question of defendant's guilt to them upon that one alone. *p. 248.*

**VENUE.**—*Change of Judge.*—*Appointment of Special Judge.*—*Discretion of Court.*—*Statute Construed.*—Under section 1839, Burns' R. S. 1894 (1770, R. S. 1881), in all cases upon a change from the presiding judge, where in the opinion of the court it shall be difficult to procure a regular judge to try the cause, the right to appoint some disinterested attorney of the State in good standing, is wholly within the discretion of the court, and will not be interfered with on appeal, unless it affirmatively appears that the court has abused such discretion to the prejudice of the substantial rights of the complaining party. *pp. 248, 249.*

**JURY.**—*Special Venire.*—*Criminal Law.*—*Statute Construed.*—Under section 1894, Burns' R. S. 1894 (1888, R. S. 1881), the court has the right to order a special venire to serve as jurors in the trial of a criminal cause. *p. 249.*

**EVIDENCE.**—*Confession.*—*Admission Of, on Trial of Accused.*—The question to be determined in the admission in evidence of a written confession made by the accused is whether there had been any threats made in obtaining such confession of such a nature as to cause defendant to state that which was false from fear of such threats. *pp. 249-252.*

**SAME.**—*Weight Of.*—*Admission in Evidence of a Confession Made by Defendant.*—This court will not weigh the evidence given in the trial court upon the competency of the admission in evidence of a written confession made by defendant, or attempt to reconcile conflicts therein, where there is evidence introduced which well and fully supports the decision of the court. *pp. 252, 253.*

**CRIMINAL LAW.**—*Instruction.*—*Abortion.*—*Statute Construed.*—In the trial of a person charged with procuring an abortion an instruction to the jury, that, if the abortion was procured as alleged in the indictment, the offense was complete without regard to the fact as to whether or not death resulted from such unlawful act, stated the law correctly, notwithstanding the indictment charged both miscarriage and death as the consequences of the criminal acts alleged, as either miscarriage or death completes the offense, under the provisions of section 1996, Burns' R. S. 1894 (1923, R. S. 1881). *p. 253.*

**INSTRUCTION.**—*Reasonable Doubt.*—*Not Applicable to Subsidiary Evidence.*—An instruction in the trial of a criminal cause, that "the doctrine of reasonable doubt, as a rule, has no application to mere matters of subsidiary evidence, taken item by item, but is applicable always to the constituent elements of the crime charged," states the law correctly as it is to the material facts and not to the mere items of subsidiary evidence which may aid in proving the essential facts that the rule of reasonable doubt applies. *pp. 254, 255.*

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**SAME.**—*Evidence.*—*Confession.*—*Criminal Law.*—Where a written confession of defendant in the trial of a criminal cause was admitted in evidence, an instruction to the effect that such a confession was subject to mistakes that might arise from the misunderstanding of the meaning of the words used by the defendant, or by using words not used by the defendant, or by substituting the language of the person writing the confession for that of the defendant was properly refused as an invasion upon the province of the jury. *pp. 257, 258.*

**SAME.**—*Evidence.*—*Confession.*—An instruction, that if the jury believed that a certain part of defendant's confession admitted in evidence in the trial of a criminal cause was false, then such confession might be disregarded entirely, was properly refused. *p. 258.*

**SAME.**—*Evidence.*—*Confession.*—*Competency of, a Question for the Court.*—Instructions seeking the submission to the jury of the competency of a written confession, made by defendant and admitted in evidence in the trial of a criminal cause, was properly refused for the reason that such question was a preliminary one to be determined by the court, and such question having been settled and passed upon by the court in the admission in evidence of such confession, defendant was not entitled to have such question submitted to the jury for its decision. *pp. 258, 259.*

**EVIDENCE.**—*Order of Admission.*—*Criminal Law.*—*Abortion.*—In the trial of a person charged in procuring an abortion resulting in death, evidence by a physician who made a *post mortem* examination of the body of the deceased as to the manner in which the miscarriage was produced, properly preceded proof of the *corpus delicti*, as such evidence tended to prove the *corpus delicti*. *pp. 259, 260.*

**SAME.**—*Competency of Physician to Testify as to Facts Obtained in His Professional Business.*—*Criminal Law.*—*Abortion.*—In the trial of a charge of abortion resulting in death, evidence by the physician who attended deceased, and who was present as her physician when the miscarriage occurred, as to what he discovered upon an examination of the patient during such attendance, is not prohibited by section 505, Burns' R. S. 1894. *pp. 260, 261.*

**SAME.**—*Character of Witness.*—*Not Confined to Present Residence.*—The inquiry as to the reputation of a witness is not necessarily confined to his present residence, but may be traced back to his former residence where he had lived fifteen months before. *pp. 261, 262.*

**SAME.**—*Abortion.*—*Letter Written by Deceased Before the Commission of the Offense not Admissible.*—A letter written by deceased several days before an abortion was committed, resulting in her death, which tended to show that she herself had attempted to produce the miscarriage, was not admissible in evidence in the trial of a person charged with aiding in procuring such abortion. *pp. 262, 263.*

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From the Montgomery Circuit Court. *Affirmed.*

*Clodfelter & Davis* and *George P. Haywood*, for appellant.

*W. A. Ketcham*, Attorney-General, *Merrill Moores*, *Dumont Kennedy*, and *Thomas & Whittington*, for State.

JORDAN, C. J.—Appellant and one William R. Stout were jointly indicted by the grand jury of Montgomery county for the crime of producing an abortion. The defendant Stout severed, and appellant was alone tried and convicted, and over his motion for a new trial he was sentenced in accordance with the verdict of the jury to pay a fine and be imprisoned in the State prison for a term of five years. The indictment contains three counts, but the court in its instructions confined the jury in their deliberations to the second count by instructing them that under the evidence there could be no conviction upon the first or third, and the verdict discloses that the jury found appellant guilty as charged in the second count of the indictment, hence all questions relating to the first and third counts may be considered as properly eliminated from the case.

Appellant in his motion for a new trial assigned one hundred and four reasons for setting aside the jury's verdict, and his learned counsel in their brief seek to present numerous alleged erroneous rulings upon the part of the lower court. The prosecution is based upon section 1996, Burns' R. S. 1894 (1923, R. S. 1881), which is as follows:

"Whoever prescribes or administers to any pregnant woman, or to any woman whom he supposes to be pregnant, any drug, medicine, or substance what-

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ever, with intent thereby to procure the miscarriage of such woman, or, with like intent, uses any instrument or means whatever, unless such miscarriage is necessary to preserve her life, shall, if the woman miscarries or dies in consequence thereof, be fined not more than five hundred dollars nor less than fifty dollars, and imprisoned in the state prison not more than fourteen years nor less than three years."

The second count of the indictment reads as follows:

"And the grand jurors aforesaid, on their oaths aforesaid do further present that one William R. Stout and one Philip Hauk, on the 18th of January, 1896, at and in Fountain county, and State of Indiana, did then and there unlawfully, feloniously and willfully use a certain instrument and substance to the grand jurors unknown, in and upon the body and womb of Grace McClamrock, who was then and there a pregnant woman, by then and there unlawfully, feloniously, and willfully introducing said instrument and substance into the body and womb of the said Grace McClamrock with the intent then and there and thereby to procure the miscarriage of the said Grace McClamrock, the said William R. Stout and the said Philip Hauk then and there well knowing that the said Grace McClamrock was then and there a pregnant woman, and the said Grace McClamrock in consequence thereof and by said use of said substance and instrument as aforesaid, did, on the 20th day of January, 1896, at and in the county of Montgomery and State of Indiana, miscarry; and the said Grace McClamrock in consequence thereof, and by said use of said instruments and substance, and in consequence of said miscarriage, did, on the 24th day of January, 1896, at and in the said county of Montgomery and State of Indiana, die; said miscarriage not being then

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and there necessary to preserve the life of the said Grace McClamrock."

We will address our inquiry to the several rulings or decisions of the court, upon which counsel for appellant insist upon a reversal, in the order in which they have been presented in their brief. Appellant applied for a change of venue to another county, basing his application therefor upon the alleged grounds that he could not secure a fair and impartial trial in Montgomery county on account of the excitement, bias and prejudice existing therein against him and his cause of defense. He filed in support of his said application the affidavits of nine persons. The State resisted the change and in support of its resistance filed the affidavits of sixteen persons, all tending to disprove that any excitement, bias or prejudice existed in the county against the appellant that would prevent him from having a fair and impartial trial therein.

It was shown that some of the affiants whose affidavits were produced by the State, had but recently been in all parts of the county, and from their conversations and intercourse with its citizens had an opportunity to familiarize themselves relative to the facts about which they deposed. The court denied this application, and this, counsel for appellant urge, was an abuse of a sound judicial discretion. A change of venue in a criminal action, not punishable by death, by the provisions of section 1840, Burns' R. S. 1894 (1771, R. S. 1881), is left to the sound discretion of the trial court, and under a firmly settled rule, it must affirmatively appear upon appeal, that this discretion has been abused to the injury of the complaining party, in order to avail the latter in securing a reversal. *Walker v. State*, 136 Ind. 663; *Reinhold v. State*, 130 Ind. 467. Under the facts, we cannot affirm that

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such abuse of discretion upon the part of the lower court in overruling the motion for a change appears, and therefore there is no available error upon the court's ruling in this respect.

Appellant sought to abate the action against him upon the grounds, alleged in his plea of abatement, that such a state of mind existed upon the part of each of the grand jurors who returned the indictment in the cause as incapacitated each of them from acting in the matter impartially and without prejudice to his substantial rights. As an excuse for not interposing this objection to the grand jurors by challenge before they were sworn as provided in section 1725, Burns' R. S. 1894 (1656, R. S. 1881), it appears in substance, by the averments of the plea, that at the time the grand jury was in session, and at the time they found and returned the indictment, appellant was confined in the county jail upon the charge, and had no opportunity to challenge said grand jury, and, by being incarcerated in jail, he was prevented from so doing; that he was wholly without means to obtain counsel, and was dependent on his friends for assistance, and, at the time the indictment was returned, he was ignorant of the law which permitted him to exercise the right to challenge the said jury or any member thereof. Section 1725 (1656), *supra*, gives to any person held to answer to the charge of a felony or misdemeanor the right to challenge, before the grand jury is sworn, any member thereof, for certain enumerated causes, the seventh cause mentioned being substantially that such a state of mind exists upon the part of the jurors relative to the accused that they cannot act in his case impartially and without prejudice. A demurrer upon the part of the State was sustained to the plea, and this, it is contended, was error. Challenges to the poll of a grand jury under this section

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by a person held to answer a criminal charge must be made before the jury is sworn, and, in general, the objection is waived by a failure to assert it at the time prescribed by the statute. It is true that a party charged with a crime may at the time the grand jury is impaneled be placed under such circumstances as will excuse him from availing himself of his right to challenge or object to the jurors at that time, and for this reason be permitted thereafter to exercise it by way of a plea in abatement to the indictment. This is recognized by the decisions of this court. *Mershon v. State*, 51 Ind. 14; *McClary v. State*, 75 Ind. 260. The law, however, does not favor pleas in abatement, and no presumptions are indulged in their favor, but they are required to be certain, and must state every fact necessary to uphold their sufficiency. *Mershon v. State, supra*. Tested by this rule, and the insufficiency of the plea in controversy is apparent. It is not shown by any facts therein alleged that the defendant was in jail at the time the grand jury was sworn or impaneled, but it is averred that he was in jail at the time *the grand jury was in session and when they found and returned the indictment*. It might be true that appellant was in custody at the time the jury was in session and when the indictment was returned, and still he might have been on bail or had counsel when the grand jury was sworn, and had ample opportunity at that time to assert his right of challenge. There are no facts averred in the plea showing affirmatively that appellant either attempted in any way to avail himself of his right of challenge, or that he was prevented by any circumstances from doing so at the proper time. The court therefore properly sustained the demurrer to the plea in abatement.

The next insistence is that the count of the indictment upon which appellant was convicted discloses

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that the offense was committed in Fountain county, and consequently the original jurisdiction thereof was, under the law, lodged in the Fountain Circuit Court, and upon this ground it is contended that appellant's motion to quash this count should have been sustained. The learned counsel appearing in behalf of the State concede that, under the general rule, jurisdiction of the grand jury to return the indictment, and of the court to try the accused, is confined to the particular county wherein the crime was committed, but they claim that under the facts alleged and also as proven upon the trial, that jurisdiction over the alleged offense is controlled by section 1649, Burns' R. S. 1894 (1580, R. S. 1881), which is as follows: "Where a public offense has been committed partly in one county and partly in another, or the act or effects constituting or requisite to the consummation of the offense occur in two or more counties, the jurisdiction is in either county." In *Archer v. State*, 106 Ind. 426, this court, in construing this section of the criminal code, affirmed its constitutional validity, and held that under the facts in that case, which disclosed that a conspiracy to commit murder was formed in one county and the victim was seized and bound therein, and then taken into another county and killed, that jurisdiction of the offense was in either county. The court, per Elliott, J., there said: "Where the crime is composed of several elements, and a material one exists in either one of two counties, the courts of either county may, under our statute, rightfully take jurisdiction of the entire crime."

The question was thoroughly considered in the *Archer* case, and many authorities cited in support of the holding. In the appeal of the *State v. Pauley*, 12 Wis. 599, it was held under a statute of that state providing that where a mortal wound is given in one



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county and in consequence thereof death ensues in another, that the offense may be prosecuted in either county. The court there affirmed that where the mortal blow is struck in one county and death results therefrom in another, that the proper court in either county, which first takes cognizance of the crime, will retain exclusive jurisdiction. In the course of the opinion, it was said: "The offense of manslaughter did not consist of the mere shooting and wounding of the deceased. On the contrary, the causing of his death was the most material element of the offense, and this did not take place there. The blow was struck in one county and its effect was produced in another."

These authorities support the principle contended for by the State that within the contemplation of section 1649 (1580), *supra*, jurisdiction over a crime exists where any one or more of its substantive and material parts are committed. The inquiry then is, what are the essential elements which are required to exist or be present in order to constitute the offense defined by section 1996, Burns' R. S. 1894 (1923, R. S. 1881), upon which this prosecution is based, and did any of these elements of material parts exist, or occur in Montgomery county, as shown by the averments in the indictment? It is evident, we think, that the crime charged against appellant does not alone consist of merely prescribing for, or administering the drug, medicine, or substance to either the pregnant, or supposed pregnant woman, with the intent to procure a miscarriage, or by using some instrument or other means with a like intent. Miscarriage or death of the woman must result as a consequence of the unlawful antecedent act or acts done or perpetrated by the accused with the intent to procure the abortion, or no crime under the statute is committed.

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Miscarriage or death, as the case may be, crowns the offense, and constitutes a material part thereof. The indictment charges that Grace McClamrock, the woman upon whom the alleged crime was perpetrated, in consequence of the use of the instrument and substance, miscarried and died in Montgomery county. Either of these facts is a material part of the offense, which when combined with those averred to have occurred in Fountain county, constitute the crime in its entirety. It must follow, then, that, under the cases cited, the offense charged was partly committed in each of the counties mentioned, and in accordance with section 1649 (1580), *supra*, jurisdiction was lodged in the circuit court of either, and appellant, therefore, was rightfully indicted and tried in Montgomery county.

The indictment is not bad for duplicity for the reason insisted by counsel, that it alleges both miscarriage and death. *Rhodes v. State*, 128 Ind. 189, 25 Am. St. 429.

It is next urged that the court erred in not requiring the State to elect upon which count of the indictment it would ask for a conviction. But it appears the court withdrew all the counts except the second from the consideration of the jury, and submitted the question of appellant's guilt to them upon that one alone; under such circumstances no available error could result from the action of the court in this respect. See *Mills v. State*, 52 Ind. 187.

A change of venue from the regular judge was obtained, and the latter being unable to secure some other judge to preside at the trial, appointed Hon. E. C. Snyder, who, as it appears, was a competent and disinterested attorney of the bar, to serve as a special judge in the case. The action of the court in appointing Judge Snyder is complained of by ap-

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pellant. Under section 1839, Burns' R. S. 1894 (1770, R. S. 1881), in all cases upon a change from the presiding judge, where, in the opinion of the court, it shall be difficult to procure a regular judge to try the cause, the right to appoint some disinterested attorney of the State in good standing, is wholly in the discretion of the court, and on appeal we will not interfere with such discretion unless it affirmatively appears that the lower court has abused it to the prejudice of the substantial rights of the complaining party. *Kane v. State*, 71 Ind. 559; *Walter v. Walter*, 117 Ind. 247. The record does not disclose any abuse upon the part of the regular judge of the lower court in making the appointment in question.

Counsel contend that the court erred in ordering a special venire for fifteen persons to serve as jurors, whose names were drawn as provided by section 1453, Burns' R. S. 1894 (1388, R. S. 1881). This act of the court was authorized by this section of the statute, and it does not appear that appellant was thereby prejudiced in any of his rights. *Wood v. State*, 92 Ind. 269; *Merrick v. State*, 63 Ind. 327; *Hayl v. State*, 109 Ind. 589.

At the trial, what purports to be a written confession, made by appellant while in jail upon charge of the crime of which he was convicted, was offered in evidence by the State. This confession tended to implicate appellant and Doctor Stout, his co-defendant. Appellant objected to its introduction upon the ground, that it had been made under the influence of fear produced by threats, and asked to have the jury excused, and be permitted to introduce evidence to show such alleged facts to the court. The court excused the jury and heard evidence upon the part of both appellant and State, upon which it held the confession competent evidence, and over appellant's ob-

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jections permitted it to be read to the jury. The document embracing the confession in dispute was dated at Covington, Indiana, January 27, 1896, being two days after appellant's arrest on the charge in question, and was signed by him. Therein it was stated that accused "testified of his own free will and accord," and that he was the father of the child of which Miss McClamrock had been prematurely delivered; that on January 11, 1896, he had arranged with Dr. Stout to produce an abortion on this woman, who at that time, as he stated, was about three months advanced in pregnancy. He further said that on the 18th of said month he took Miss McClamrock to Dr. Stout's office in Covington, and that she and the latter went into an adjoining room, where the doctor operated upon her by passing some instrument into the womb. The confession in question then proceeds to detail what was said and done by appellant and Stout at the office after this operation had been performed; that the doctor gave the girl some morphine pills, and told her to take them, to allay the pain, and directed appellant that, in the event she was subjected to much pain, to call some physician he could trust, but never to divulge to any one that he, Stout, had produced the abortion. Appellant offered himself as a witness in support of his objections, and testified relative to his arrest upon the charge on January 25, and how he came to make the confession.

Much evidence was introduced before the court by both the State and defendant relative to the question under consideration. It appears from this evidence that at the time the appellant made the confession in controversy, he was confined in the county jail at Covington, upon the charge of which he was convicted; that his father and some other friends were present at the jail, together with the county coroner; that he was

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urged by his father and the others to "tell the truth about the whole matter and keep nothing back;" that, after some other talk of a similar character had taken place, the appellant slapped one of the parties upon the knee and said, "I am going to tell it all." Upon this being said, his father went to him and replied: "I am glad of this, my boy," and then passed out into the jail corridor.

Appellant then orally stated what he claimed to be his and Dr. Stout's connection in producing the miscarriage of Grace McClamrock, and at the suggestion of the coroner the statement was reduced to writing, and appellant, after reading it over, and making some changes, signed it. Witnesses testify that, after the accused had signed the paper, he appeared bright, and said: "I feel better than I ever did in my life." There is evidence also tending to show that prior to the defendant's confession, but after he had been arrested and committed to jail, that he had been informed that much excitement existed upon the part of the public, and he might expect a crowd to come to the jail any hour; that if he would tell what connection Stout had in procuring the abortion he would "be let off," if not he would be sent to prison for twenty years, and that his mother and sister would be implicated and arrested. There is also evidence tending to show that appellant, at the time he made the confession, was nervous and in grief over the death of Miss McClamrock.

Appellant, as we have seen, challenged the competency of the confession as evidence, upon the statutory ground that it was involuntarily made, under the influence of fear produced by threats, and, therefore, under section 1871, Burns' R. S. 1894 (1802, R. S. 1881), was not admissible as evidence. There was nothing contained in this written confession disclosing that

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it was not voluntarily made; in fact, it contained the statement that it was made by the appellant of his "own free will and accord," and it was attested by his own signature. It was *prima facie* competent. A confession by a person accused of a crime is presumed to be voluntarily made until the contrary is shown. The accused asserted that it was involuntary, being made under fear produced by threats. Under the circumstances the burden of proving this fact rested upon him. *Brown v. State*, 71 Ind. 470; *Rufer v. State*, 25 Ohio St. 464; Wharton's *Crim. Ev.* (9th ed.), sections 319 and 320; *State v. Patterson*, 73 Mo. 695; *Commonwealth v. Culver*, 126 Mass. 464; *People v. Barker*, 60 Mich. 277, 27 N. W. 539; *State v. Hopkirk*, 84 Mo. 278; *State v. Meyers*, 99 Mo. 107, 12 S. W. 516.

The real question presented for the court to determine from all the evidence adduced was whether there had been any threats of such a nature that the defendant would be likely to state that which is false, from the fear of the threat. Gillett *Crim. Law*, section 857, and authorities there cited; Wharton's *Crim. Ev.*, section 658. This fact appearing to the satisfaction of the court would exclude the confession as evidence, under the provisions of section 1871 (1802). *supra*.

We have carefully read the evidence given upon the point involved, and when considered as an entirety, as it must be, we are of the opinion that it does not appear that the appellant, in making the confession in question, did so involuntarily, through fear, resulting from threats. The court, therefore, did not err in overruling appellant's objections, and the confession was properly admitted for the consideration of the jury. *People v. McGloin*, 91 N. Y. 241, and cases cited; *State v. Patterson*, *supra*. Again, upon another view of the question, the competency of this confession as evidence against appellant was made an issue before the

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trial court for its determination, and as there is evidence introduced which well and fully supports its decision in holding the confession to be competent, we are not authorized to weigh the evidence given upon the point involved, or attempt to reconcile any conflict therein, but, under a well settled rule, we are required to sustain the finding thereon of the lower court. *Keyes v. State*, 122 Ind. 527; *Smith v. State*, 142 Ind. 288.

The court, on its own motion, gave twenty instructions to the jury, which, when considered as a whole, correctly advised them upon the law relative to the questions involved. Appellant criticises some of these charges, and we will specifically review those in dispute. The fourth instruction simply stated the facts essential to give the court of Montgomery county jurisdiction over the offense, and, in substance, is in harmony with our holding herein, upon that point. The sixth charge of the court is condemned by counsel for appellant upon the ground that it was not proper to inform the jury, as it did substantially, that, if the abortion was procured as alleged in the second count of the indictment, the offense was complete without regard to the fact that the death of Grace McClamrock resulted from the abortion or improper treatment of the attending physician in her sickness. If the miscarriage was produced by the unlawful antecedent act of the appellant, as charged, then, under the statute, the offense was complete; and the fact that her death may have resulted from the improper treatment of her physician or otherwise, would not operate to defeat his conviction. The indictment, it is true, charged both miscarriage and death as the consequences of the criminal acts alleged, but it was not incumbent upon the State to establish both facts in order to convict, as by the provisions of the statute

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either miscarriage or death as a result completes the offense.

The 8th, 9th, 10th, 11th, and 12th instructions relate to what constituted a reasonable doubt, and the influence such doubt exerted over the jury in their consideration of the evidence. Counsel especially complain of the 10th and 11th. These are as follows: "10. But this rule of law which clothes every person accused of a crime with the presumption of innocence, and imposes on the State the burden of establishing his guilt beyond a reasonable doubt, is not intended to aid any one who is in fact guilty of crime to escape, but is a humane provision of the law, intended so far as human agencies can, to guard against the danger of any innocent person being unjustly punished. And by reasonable doubt, is not meant a whim, or captious or speculative doubt. It is properly termed a reasonable doubt, as distinguished from an unreasonable or speculative doubt, and it must arise from all the evidence relating to some material fact or facts, charged in the indictment, and not spring from mere subsidiary evidence. Such doubt may also arise from the absence of evidence as to material matters.

"11. But the doctrine of reasonable doubt, as a rule, has no proper application to mere matters of subsidiary evidence, taken item by item, but is applicable always to the constituent elements of the crime charged, and to any fact or group of facts which may constitute the entire proof concerning any of the constituent or elementary facts necessary to constitute guilt. If from the whole evidence, or the want of evidence, any material fact essential to a conviction has not been established to your satisfaction beyond a reasonable doubt, as explained in these instructions, the defendant should be acquitted."

The insistence is that both of these charges are



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wrong, for the reason that each deny that the doctrine of reasonable doubt has any application to mere matters of subsidiary evidence. The law in this respect, as declared in these instructions, is in accord with that asserted by this court in *Wade v. State*, 71 Ind. 535. While the State in a criminal prosecution may rely upon mere subsidiary or subservient facts, yet, in a broader sense, it must, in order to convict, rely upon and establish beyond a reasonable doubt all the material facts which constitute the accused guilty of the crime charged. It is to such facts, and not to the mere items of subsidiary evidence which may aid in proving the essential facts, that the rule of reasonable doubt applies. These charges otherwise are in harmony with the decisions of this court, and we perceive no available objections that can be urged against them. In fact, when these are considered together with the others given upon the question of reasonable doubt, we are of the opinion that the jury was fully and correctly advised as to the law applicable to that feature of the case.

Appellant presented and requested the court to give to the jury a series of some twenty-seven instructions, all of which were refused, and upon this action of the court appellant predicates error. Some of these, under the facts in the case, are so palpably wrong that the court's refusal to give them merits no special review. Others are sufficiently embraced in those given by the court, and were properly refused upon this ground. By instruction three, of those requested, the court was asked to inform the jury that there was no evidence as to what transpired at the office of Dr. Stout except the testimony of the latter, which it declares disproved that any criminal action was there performed, and therefore the jury should acquit the defendant. Appellant's own admissions and other material evi-

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dence bearing upon this question are wholly ignored in this charge, and the bare denial of Stout is to result in his acquittal. The error is apparent.

The elements of the fourth charge requested, upon the question of reasonable doubt, were embraced in those given, and the court was not bound to repeat them. The fifth and sixth advised the jury to acquit the defendant if the death of Miss McClamrock was not the result of the miscarriage. These were properly refused upon this question, for the reason heretofore stated. The ninth and tenth also relate to the question of reasonable doubt, and are substantially embraced in those given. Charge seventeen, as requested, was to the effect that if the jurors were not convinced beyond a reasonable doubt that the accused took Miss McClamrock to the office of Dr. Stout for the purpose of having an abortion procured, they must acquit him, unless it was further made to appear, beyond such a doubt, that after he arrived at the office he in some way "aided and assisted" in the procurement of the abortion. Section 1857, Burns' R. S. 1894 (1788, R. S. 1881), provides as follows: "Every person who shall aid or abet in the commission of a felony, or who shall counsel, encourage, hire, or command, or otherwise procure a felony to be committed, may be charged, etc., as if he were a principal."

The instruction narrowed these provisions of the statute to aiding and assisting, to the exclusion of all the other acts therein defined that may render a party guilty in like manner as the principal offender.

The purpose that induced him to take the girl to the office of Stout was not material, if appellant aided or abetted in the commission of the felony charged, or counseled, encouraged, hired, or commanded, or otherwise procured it to be committed. In either of these events, under this section of the statute, he would be

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guilty the same as though he was a principal, and might be tried and convicted in like manner, and subjected to the same penalty. For the reasons stated the instruction was not correct, and was therefore properly refused.

The eighteenth is also open, in part, to the same objections that may be urged against the seventeenth, and it may be further said in its condemnation that its tendency was to confuse and mislead the jury. The leading idea expressed therein was that if the jury was not satisfied beyond a reasonable doubt that the abortion in question was procured by the defendant and Dr. Stout, in the office of the latter, in Fountain county, the defendant must be acquitted. It was uncertain, and tended to mislead, in this, that the jury might in reason have understood it as meaning that the miscarriage in dispute must have occurred in Stout's office in order to render the defendant guilty of the crime charged. It was rightfully rejected for this reason alone. The nineteenth instruction refused in part declared, that: "Any admission or confession verbally made by the defendant and written down by another is subject to mistakes that may arise from the misunderstanding of the meaning of the words used by the defendant, or by using words not used by the defendant, or by substituting the language of the person so writing down such admission or confession, for that of the defendant." To have given this instruction as written would unquestionably, under the decisions of this court, have been an invasion upon the province of the jury. It cannot be said, as a matter of law, that the admissions of the defendant, under the circumstances mentioned, are subject to mistakes. It was proper matter of argument to the jury that the evidence in question under the facts might be or was

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subject to mistake, and the court might have properly called the attention of the jury to this question. The following decisions fully support our conclusions: *Garfield v. State*, 74 Ind. 60; *Davis v. Hardy*, 76 Ind. 272; *Morris v. State, ex rel.*, 101 Ind. 560; *Unruh v. State, ex rel.*, 105 Ind. 117.

Number 20 requested the court to charge the jury that if they believed that the part of defendant's confession which referred to an arrangement made with Dr. Stout, January 11, 1896, was false, then the jury had the right to disregard the confession entirely.

It is manifest, we think, that the court would not be authorized to advise the jury that if they did not believe a part of the defendant's own voluntary admission relative to his guilt, then they were at liberty, for this reason alone, to reject the whole of this evidence, regardless of the fact that they might believe the part rejected to be true. The rule asserted by the ancient maxim of the law of evidence, *falsus in uno falsus in omnibus*, is interpreted by the courts to mean that where a witness willfully swears falsely as to some material matter in a cause so as perjury may be imputed to him, the jury may disregard his entire testimony, unless it be corroborated by other evidence. *Lemmon v. Moore*, 94 Ind. 40. Or, in other words, it may be said that the jury ought not to reject that part of the witness' testimony which, under the circumstances, they believe to be true. The instruction was properly refused.

By instructions 22, 23, 24, and 25, requested by appellant, he sought to have the court submit the competency of his written confession to the jury for its decision, upon the alleged ground that it was made by him under the influence of fear produced by threats.

The question of the exclusion of this confession as incompetent evidence, for the alleged reason that it

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was made through fear produced by threats, became a preliminary one, to be determined by the court, and this legal question under the evidence given thereon having been settled by the court, appellant was not entitled to have it submitted to the jury for its decision. *Brown v. State*, 71 Ind. 470; *Redd v. State*, 69 Ala. 255; 3 Rice on Evidence, section 308; 1 Greenl. Ev., section 219; 1 Phil. Ev. \*543.

Instruction 26, which asked the court in effect to direct an acquittal in view of the evidence, merits no consideration.

During the selection of the jury appellant challenged for cause two jurors. Both of these challenges were overruled. Complaint is made of these rulings. The opinion which these jurors had formed seemed to be based upon reading accounts in the papers and talking with persons other than witnesses. The examination of the jurors clearly shows that they were each capable of acting impartially in determining the particular issue to be tried, and, under the provisions of section 1862, Burns' R. S. 1894 (1793, R. S. 1881), the court properly exercised its discretion in holding that they were competent to serve.

Two physicians, Barcus and Olin, testified in behalf of the State in regard to a *post mortem* examination made upon the body of Grace McClamrock. Doctor Barcus, after detailing to the jury fully what he had observed upon this examination relative to the condition of the womb and the afterbirth, etc., gave it as his opinion that there had been a miscarriage. He was then asked to state "Whether, from the conditions found, the miscarriage occurred from some natural physical difficulty, or whether by some foreign interference." In response to this question, the witness said that in his judgment the miscarriage was brought about by some foreign interferences. The contention

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of counsel for appellant is that the question was not competent, for the reason that it assumed that the miscarriage which the witness had stated in his opinion had resulted, was caused by some physical defect or by some foreign interference. Possibly the question was somewhat suggestive and faulty, but it does not appear that appellant was in any manner prejudiced thereby.

It is also insisted that the admission of this evidence was erroneous for the reason that it preceded the proof of the *corpus delicti*. Counsel are, however, mistaken in their insistence, for the very purpose of this evidence was to show that a miscarriage had been produced, and the means by which it had been brought about. This certainly tended to prove the *corpus delicti* as defined in *Traylor v. State*, 101 Ind. 65. See, also, *People v. Aikin*, 66 Mich. 460, 11 Am. St. 512, 33 N. W. 821. The evidence was competent, its weight being a question for the consideration of the jury. Dr. Olin was the physician who attended Miss McClamrock, at the request of appellant, at the time of her alleged miscarriage; and he was permitted to give evidence of what he discovered upon an examination of his patient during his attendance, and also the fact that the miscarriage occurred while he was present as her physician. Appellant objects to this evidence mainly upon the ground that under the provisions of section 505, Burns' R. S. 1894, the doctor was prohibited from testifying to any facts or matter discovered by him in the course of his professional business. The rule declared by the statute, which forbids a physician to reveal in evidence matters discovered by him in the course of professional attendance or treatment of a patient, is intended to protect the latter, and not to shield one who is charged with perpetrating an unlawful act upon the patient. The statute cannot be so construed as to permit a party

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charged with crime, to invoke it as a weapon of defense in his own favor, instead of its being used as a protection to his victim. This interpretation, in our opinion, accords with reason and is supported by authority. *Pierson v. People*, 79 N. Y. 424, 35 Am. Rep. 524. The court did not err in admitting the evidence in dispute.

Dr. Stout, a co-defendant, testified on the trial in behalf of appellant. This witness resided at Covington, Indiana, and had resided at the latter place for about fifteen months, and over, prior to the trial. Before removing to Covington he resided at the town of Hillsboro, some fifteen miles from the former place. The evidence shows that after the doctor left Hillsboro and located at Covington he continued to practice his profession at the former place, and made frequent visits to this town. There was evidence introduced by the State tending to impeach the moral character of the doctor at Covington, and the State then, for the purpose of further impeaching the moral character of this witness, introduced some ten witnesses who resided at Hillsboro. These, over the objection of appellant, were permitted to testify as to the general reputation of the doctor for morality at Hillsboro. Appellant insists that the impeaching evidence ought to have been confined, under the circumstances, to Covington, where the witness sought to be impeached resided at the time of the trial. When the character of a witness is assailed the inquiry relates to his character at the time of the trial, or examination, or some period reasonably near to these dates. This seems to be the rule asserted by the drift of the authorities. It is disclosed that this witness had lived at Covington only about fifteen months, that he continued to practice at his former residence, and made frequent visits to that town. We think that the State had the right to trace his reputation back to his former home, and

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show that he was there also in bad repute for morality. This evidence, under the circumstances, is fully authorized by the holdings of this court in *Memphis, etc., Packet Co. v. McCool*, 83 Ind. 392, 43 Am. Rep. 71; *Pape v. Wright*, 116 Ind. 502; *Houk v. Branson*, 17 Ind. App. 119; *Sage v. State*, 127 Ind. 15.

Appellant, over the State's objections, introduced in evidence a letter purporting to have been written January 10, 1896, by Grace McClamrock, being about eight days before the alleged attempt to produce the abortion on her. This letter in part tended to show that she herself had attempted to produce the miscarriage, and apparently was introduced for that purpose. The State introduced the father of Grace, and his evidence tended to show that the letter was not genuine. Appellant then offered some evidence which it is claimed tended to rebut that introduced by the State upon the authenticity of the letter in question. This was excluded by the court, and this, it is said, was error.

The learned counsel for the State contend that the letter was not proper evidence in the defendant's favor, and that the court ought to have sustained the State's objections, and excluded it. We are of the opinion that this contention is correct, and that appellant was not entitled to have this letter considered by the jury as evidence in his favor. Under the circumstances, it was not competent upon any legal ground. It was written, as it appears, several days before the commission of the offense which is averred to have subsequently resulted in causing the death of the girl, and therefore there could be no claim that it was of the character of a dying declaration upon the part of the deceased. The letter was but a narrative of a past transaction, accompanied by no act whatever, and was not surrounded by any circumstances that could im-



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press it with the ordinary sanction of an oath. It was of the character of hearsay, and open to the same objections, and the court erred against the State in admitting it in evidence. *Jones v. State*, 64 Ind. 473; *Commonwealth v. Felch*, 132 Mass. 22; *People v. Aikin*, *supra*.

In *Jones v. State*, *supra*, the defendant was charged with murder, and offered to prove that another person had threatened to kill the deceased, and after the death of the latter admitted that he had committed the crime. It was held by this court that this evidence was correctly rejected.

In *Commonwealth v. Felch*, *supra*, the defendant was charged with the crime of abortion, from the effects of which his victim died. On his trial he offered to prove that, a short time before the alleged offense, the woman stated to the witness that she was pregnant by a person other than the defendant. That if this witness would not procure a miscarriage for her, or get some one to do so, she would operate upon herself. It appeared that these declarations were neither accompanied by nor explanatory of any act. The court held the evidence to be hearsay, and therefore not admissible.

Appellant not being entitled to use this letter as evidence, consequently cannot be heard to complain of that introduced by the State to assail its authenticity, or by the action of the court in rejecting that which he offered to sustain it. It is evident that in this respect he was not prejudiced in any of his rights.

His counsel next, and finally, urge that the evidence does not prove the guilt of appellant. We have examined and considered the evidence, and are satisfied that it fully justifies the jury in their finding. The evidence, as it is disclosed to us in the record, cannot be explained upon any hypothesis consistent with the innocence of the appellant. We have given this ap

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peal a careful examination, and find nothing to show that appellant was not given a fair and impartial trial, and under the facts rightfully convicted.

The judgment is, therefore, affirmed.

ON PETITION FOR REHEARING.

PER CURIAM.—Counsel for appellant, in their brief, on petition for a rehearing, again earnestly insist: 1st. That there was an abuse of discretion upon the part of the lower court in denying appellant's application for a change of venue from the county. 2d. That the trial court erred in admitting in evidence the confession of appellant. 3d. That the court erred in refusing to instruct the jury that if they believed that the confession was made under the influence of fear produced by threats, they should reject it, and give it no consideration. It is therefore contended that this court erred in sustaining the rulings of the lower court upon these several questions.

We have again given these and the other questions raised in this appeal a careful review and consideration, and can find no reason to disapprove the conclusions reached in the original opinion. It is contended that it was the province of the jury to determine whether the confession of the accused was made under the influence of fear produced by threats, and if they believed such to be a fact, they must reject it as evidence. Or, in other words, we are asked to virtually adjudge that the jury ought to have been permitted to exercise the prerogative of the court and decide the question of the competency of the confession as evidence. It was held, at the original hearing of this appeal, that the court having in the first instance held that the confession was competent, appellant could not require it to submit the question of its competency to the decision of the jury. The compe-

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tency of any character of evidence is a question exclusively for the determination of the court. The weight or credibility, however, to which it is entitled is a matter exclusively for the decision of the jury in accordance with the rules of law relative to that question.

The rule affirmed by the authorities cited by the court in the original opinion, and the correct one, we think, is that which requires the court to determine at the trial as a preliminary question, whether the confession of the person accused of the crime is incompetent upon the ground that it is the offspring of fear produced by threats.

When the court holds the confession admissible as evidence, it must be received by the jury, and it is not within their province to reject it as incompetent. The credibility, effect, or weight to which it is entitled, as in other evidence, is a question which the jury has the right and must determine for themselves. In deciding this question, they may and ought to look to, and consider all of the facts and circumstances under which the alleged confession was made. The credibility of the confession being a legitimate subject of inquiry upon the part of the jury, it may be impeached by the defendant in any authorized manner. While the jury may believe it to have been involuntarily made by reason of the hopes or fears of the confessor having been unduly excited, still, if there is evidence which confirms or corroborates it, so as to impress the jury with the belief of its truth to their satisfaction, in that event they would not be justified in rejecting the confession solely upon the ground that they believed it to have been involuntarily made.

In deciding upon the credibility of a confession, or upon the effect, or weight to which, if any, it is entitled, the jury has the right to subject it to the same

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tests, as far as applicable, as they would in ascertaining the credit or weight due to other evidence, and after performing this duty, if they consider it unworthy of credit, it is their right and duty then to reject it. The instruction in question was not framed so as to present to the jury the correct test to be applied by them in determining the credit or weight to be given to the confession as evidence, and was properly refused by the trial court. In addition to the authorities cited in the original opinion the following support the rule herein asserted: *Young v. State*, 68 Ala. 569; 3 Rice on Evidence, section 314; *Simmons v. State*, 61 Miss. 243.

Petition overruled.

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THE CLEVELAND, CINCINNATI, CHICAGO AND ST. LOUIS  
RAILWAY COMPANY v. GRAY.

[No. 17,966. Filed April 6, 1897. Rehearing denied June 24, 1897.]

PLEADING.—*Complaint.*—*Negligence.*—*Railroad Crossings.*—In an action for personal injuries, based upon the negligence of defendant, the fact that a particular act of negligence prohibited by statute is included in the acts constituting the negligence does not confine and limit the theory of the complaint to the statutory offense charged. *pp. 270, 271.*

SAME.—*Complaint.*—*Railroad Crossings.*—*Violation of Statute.*—In an action for personal injuries against a railroad company, based upon the negligence of such company, in violating section 2293, Burns' R. S. 1894 (2172, R. S. 1881), prescribing a penalty for a train to approach the crossing of another railroad track without stopping and ascertaining that there is no other train or locomotive in sight, need not negative the exception provided by section 5156, Burns' R. S. 1894, where there is a system of interlocking automatic signals. *pp. 271, 272.*

SAME.—*Negligence.*—*Breach of Statutory Duty.*—Where a breach of a statutory duty is alleged, and exceptions are found in the statutory declaration of duty, the pleader must show that the breach is not included in the exception. But if the exception is stated in a sub-

148	968
151	540

148	286
154	439

148	266
166	353

148	266
169	180
170	212

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sequent clause or section of the statute, or if it is declared in another statute, then such exception should be shown by way of defense to the action. *p. 272.*

**SAME.—Complaint.—Answer.**—Where a complaint discloses a *prima facie* cause of action under a statute, it is for the defendant, by way of answer, to show that the plaintiff should not recover, notwithstanding the allegations of the complaint. *p. 272.*

**EVIDENCE.—Introduction of Pleading Filed by Adverse Party.**—A party who introduces in evidence a pleading filed by the adverse party, but subsequently withdrawn, may explain and rebut portions thereof which are unfavorable to him. *pp. 274, 275.*

**RAILROAD CROSSINGS.—Signal Lights.**—The fact that signal lights, in a railroad crossing signal system, were obscured from view by a car standing across defendant's track did not excuse defendant company from the duty of stopping its trains to ascertain whether or not the crossing was clear. *p. 275.*

**SAME.—Obstruction of Signal Lights.**—That the view of the crossings of two railroads, and of the signals designed to warn a train on one track of the presence of a train on the other was obscured by an electric light maintained by the city will not relieve the company from liability for a collision between a train standing upon the crossing and another train approaching on the other track, as it is bound to exercise care commensurate with the surroundings. *pp. 275, 276.*

**SAME.—Duty of Managers of Train Approaching a Crossing.**—When means are not provided by which a collision at a railroad crossing is rendered impossible, the rule to stop, look, and listen is not less imperative on a train approaching a crossing of another railroad than upon a traveler about to approach a railroad crossing. *p. 277.*

**EVIDENCE.—Nonexpert.—Opinion.**—A nonexpert witness who has observed the condition of a person may express his opinion as to whether such person was sick or not, where it is impossible for such witness to present to the jury all of the facts upon which the opinion is based. *pp. 277, 278.*

**SAME.—As to Earning Capacity of Plaintiff as a Physician.—Damages.**—Evidence as to plaintiff's earning capacity as a physician is admissible in an action for personal injuries, as a means of enabling the jury to arrive at the proper measure of damages. *p. 278.*

From the Wayne Circuit Court. *Affirmed.*

*Elliott & Elliott and John T. Dye, for appellant.*

*Marsh & Jaqua, John S. Engle, M. G. Parry and Brown & Brown, for appellee.*

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The Cleveland, etc., Railway Company v. Gray.

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HOWARD, J.—The appellee recovered damages in the sum of five thousand dollars for injuries alleged to have been caused by the negligence of appellant.

The first paragraph of the complaint alleges that the appellant was, on May 27, 1895, the owner and operator of a line of railway extending east and west through the city of Winchester, Indiana; that said line is crossed in said city by a line of railway of the Grand Rapids and Indiana Railroad Company, which runs north and south; that just north of the appellant's line, and west of the Grand Rapids line the appellant maintained a small wooden building about ten by eighteen feet, which is used as a telegraph and signal office, and that it kept an agent and telegraph operator in said building; that from said building, by a system of levers, the appellant also operated a system of targets and signals to notify its agents and servants when the said crossing was open for its trains to pass; that when a target was swung across the main track of either of said lines it meant that the crossing was not clear for the company across whose line the target was swung to pass. It is also alleged that said building was used as the office of the Western Union Telegraph Company, and persons were invited thereto for the purpose of receiving and sending messages and transacting business with said telegraph company.

The complaint then proceeds as follows:

"And plaintiff says that on the 27th day of May, 1895, the plaintiff, in company with one Albert F. Huddleston, was lawfully at said small wooden building for the purpose of transacting business with the said Western Union Telegraph Company, and for the purpose of procuring the said agent and servant and telegraph operator of the defendant so employed and engaged aforesaid, to send a message and telegram, and the plaintiff avers that while the plaintiff and

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said Huddleston were thereat and in said small wooden building aforesaid, as they had the lawful right to be, and before they had finished the transaction of said business, a freight train on said Grand Rapids and Indiana Railroad was occupying said crossing, and was standing on the main track of said Grand Rapids and Indiana Railroad across said railroad crossing, fully occupying the same; and while the target was closed against the defendant (indicating that the Grand Rapids and Indiana Railroad Company had the exclusive right to use and occupy said crossing) the engineer, agents, and servants of the defendant who had control of, and were running a locomotive and a freight train from the east to the west, on and over the defendant's railroad, did then and there carelessly and negligently and unlawfully run said locomotive so attached to said train of freight cars, upon and across the track of the said Grand Rapids and Indiana Railroad Company at said crossing while the said freight train on said Grand Rapids and Indiana Railroad was so occupying the crossing aforesaid, and before the same had passed over said crossing, and while the same was standing still on said crossing. And the plaintiff says that the engineer who had charge of said locomotive, and was running the same so attached to said freight train, in approaching said crossing from the east, aforesaid, going to the west, did unlawfully, carelessly and negligently run said locomotive and train of cars upon and across the said track of said Grand Rapids and Indiana Railroad Company without first coming to a full stop before running his said locomotive upon and over the same, and without first ascertaining that there was no other train or locomotive in sight approaching and about to pass over said track and crossing or occupying the same. That in so carelessly and

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negligently running said locomotive and train of cars upon and over said crossing in the manner aforesaid, and while said crossing was so occupied aforesaid, the said locomotive came in contact with said train of cars, and in contact with said car so standing on, over and across said crossing on the said Grand Rapids and Indiana Railroad with great force, and violently pushed the same sidewise and to the westward over and against the said small wooden building so located aforesaid, and occupied by the plaintiff in the manner aforesaid," etc., crushing the building and overwhelming appellee in the ruins and thus causing the injuries complained of.

A demurrer was overruled to this paragraph of the complaint, and this ruling is the first error assigned and discussed by counsel.

Because it is alleged in the complaint that appellant's train ran upon the crossing "without first coming to a full stop," counsel argue that it is thereby shown that the complaint is based upon section 2293, Burns' R. S. 1894 (2172, R. S. 1881), which section of the statute prescribes a penalty for so approaching a crossing without stopping and ascertaining that there is no other train or locomotive in sight, approaching and about to pass over such other track. And counsel say that if such is the theory of the complaint the pleading is insufficient for failing to allege, in the language of that statute, that each of the railroads is one "upon or over which passengers are or may be transported."

To this it may be answered, in the first place, that the allegations of negligence as to appellant's approach to the crossing are much broader than counsel indicate. Not only is the failure to stop alleged, but the general allegation is made that the appellant "did then and there carelessly and negligently and



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unlawfully run said locomotive so attached to said train of freight cars, upon and across the track of the said Grand Rapids and Indiana Railroad Company at said crossing while the said freight train on said Grand Rapids and Indiana Railroad was so occupying the crossing aforesaid, and before the same had passed over said crossing, and while the same was standing still on said crossing." Because the particular act of negligence prohibited by the statute is included in the sum total of negligent acts charged against appellant, it does not follow that the theory of the complaint is thereby confined and limited to the statutory offense charged. See *Coulter v. Great Northern, etc., R. W. Co.* (N. D.), 67 N. W. 1046; *Chicago, etc., R. R. Co. v. Dillon*, 123 Ill. 570, 15 N. E. 181.

Another reason urged against the sufficiency of the first paragraph of the complaint, is that "it does not allege that the crossing of the appellant's line and the Grand Rapids line was not provided with interlocking switches, or 'works or fixtures,' which excused the companies from stopping their trains at such crossings."

The basis of this contention is that, while the statute above cited requires trains before reaching the crossing of another road to come to a stop and look out for trains on the other road, yet that, by section 5156, Burns' R. S. 1894 (Acts 1883, p. 55), it is provided that where roads erect "a system of interlocking or automatic signals," rendering it safe for trains to pass over on either road without stopping, then the law as to stopping and looking out for trains at the intersection will not apply. In the case at bar there were no interlocking switches, and the complaint was drawn without reference to the statute relating to such switches. We do not think this was error, even

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if the charge were merely the violation of a statutory obligation, which, as we have seen, it was not. Where a breach of a statutory duty is alleged, and exceptions are found in the statutory declaration of duty, the pleader must show that the breach is not included in the exception. But if the exception is stated in a subsequent clause or section of the statute, or if it is declared in another statute, then such exception should be shown by way of defense to the action. *Colson v. State*, 7 Blackf. 590; *Russell v. State*, 50 Ind. 174. And if a complaint discloses a *prima facie* cause of action under a statute, it is for the defendant, by way of confession and avoidance or otherwise, to show that the plaintiff should not recover, notwithstanding the allegations of his complaint. *W. U. Tel. Co. v. Scircle*, 103 Ind. 227.

But the interpretation given by counsel to the statute under discussion could not be correct in any event. If two railroads provide interlocking switches so that it may be safe for the trains of each to pass over the common crossing without stopping, it is true that the statute makes it "lawful for the engines and trains of such railroad or railroads to pass over said crossing without stopping." The reason for that, however, is, that in case of such interlocking switches, when one train is upon the crossing the other cannot go upon it. The statute does not intend so absurd a thing as to authorize one train to run into another whenever there is an interlocking switch at the crossing. On the contrary, the very fact of there being an interlocking switch at the crossing renders it impossible for one train to run into the other. The offending train would find itself off its own track if it should attempt such a feat. But when the switch is locked in favor of the crossing train, and the signal shows this fact, then, of course, the train may run through without the pos-

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sibility of intersecting a train upon the other road; and hence the statute, in such case, makes it lawful for the train to cross over without stopping.

In like manner, a train about to meet another, and not having the right of way, must, in general, turn in upon a switch and wait until the other train passes. But, in case the road has a double track, each train may run on without stopping. Nevertheless, the mere fact that a road is double-tracked would not excuse employees who should run their train by switch from one track upon the other, and so crash into a train rightfully on the other track. The observance of a law is not shown by following its letter and violating its spirit.

So here, the rule for stopping is made in order to avoid collision, but the interlocking switch makes collision impossible. In such case, the reason for the rule ceases, and the law therefore takes away the requirement to stop, which would then be not only a useless but a wasteful delay. If, however, those in charge of an approaching train should see the signals indicating that the switch was locked against them, instead of for them, they would, for their own safety, and without any law to compel them to do so, except the law of self-preservation, most certainly stop their train. Indeed the very fact that in this case there was a collision shows that there could be no interlocking switches at the crossing, or at least that no such switches were in use. Had there been an interlocking switch at the crossing it would have been open to the Grand Rapids train, which was upon the crossing; and the appellant's train, instead of running against the Grand Rapids train, would have run off the track.

It is next contended that the court erred in overruling the motion for a new trial.

Under this assignment counsel first argue that the verdict is contrary to the evidence. This argument is based on statements found in a special answer filed by appellant, but afterwards withdrawn. The answer so withdrawn was introduced in evidence by appellee, and counsel for appellant insist that as the appellee thus made the answer a part of his own evidence, he is bound by all the statements therein contained. This is hardly correct. That a withdrawn pleading may afterwards be introduced in evidence by the adverse party, is not doubtful. Such evidence, however, although introduced with the view that it shall be treated by way of admissions by the pleader, is nevertheless open to explanation, and is not to be taken as conclusive against the pleader unless it amounts to an estoppel. It is to be remembered, besides, that, in case a pleading is so introduced in evidence, "all the statements of the whole pleading are to be taken together, what makes for the pleader as well as what makes against him." As in the case of other evidence, such pleadings "go to the jury for what they may be worth." *Boots v. Canine*, 94 Ind. 408; *Baltimore, etc., R. W. Co. v. Evarts*, 112 Ind. 533. And see *Mott v. Consumers Ice Co.*, 73 N. Y. 543; and 1 Greenl. Ev. (15th ed.) section 201. But if such admissions may be explained as against the pleader, still less is the party introducing the pleading bound by all therein contained. "Ordinarily," as said in *Mott v. Consumers Ice Co.*, *supra*, "a party is not bound by the admissions of his adversary, of which he gives evidence, but is at liberty to use it so far as it makes in his favor, and to disprove the residue—that is, he is not estopped by it. The fact that the admission is in a pleading does not change its character or create an estoppel."

Many of the averments of the answer so introduced were contradicted by other evidence before the jury,

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and it was for the jury to settle the conflict thus raised. The answer states as a conclusion that there were such fixtures and signals established at the crossing as rendered it safe for engines and trains to pass over without stopping. But there was evidence that the tracks of each road were solid over the crossing, and that there was simply provided a system of signals to show whether the crossing was clear for one road or the other. There was nothing in the situation therefore which authorized a train to pass over the crossing when, as in this case, the signal showed that the crossing was not clear. Even the answer admits that at the time of the accident "said signal was turned and shut across the defendant's right of way," showing that appellant's train had no right to pass.

It is said that the answer shows that it was impossible for the employes on appellant's train to see the signal light in its crossing signal system because the same was obscured by a car of the Grand Rapids train standing across appellant's track. That was certainly a possibility whenever a train of the other road stood upon the crossing, and to be guarded against accordingly. No better reason need be given to show that appellant's train should have come to a stop in order to ascertain for a certainty that the crossing was clear. A like reply may be made to the statement that a lantern placed on a platform by employes of the Grand Rapids train was mistaken for a switch light east of the crossing, and thus gave the employes on appellant's train the impression that the crossing was clear.

As a further reason to show why appellant's employes did not see the Grand Rapids train on the crossing, it is averred in the answer that at some time previous the city of Winchester, over the protest and objection of appellant, had placed an electric light ten feet east of the crossing and near to the point where a

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public street crosses appellant's track, and that the city "continuously operated said light at said point over the objection" of the appellant. "That upon the night of the alleged injury said light was lighted and in operation by said city. That it hung a short distance above the level of an ordinary freight car;" and that by reason of said light the view of the crossing and of the signals was obscured. It thus appears that appellant knew of the light, and was hence required to take the greater precaution in passing over the crossing. Care must always be exercised in proportion to the known dangers to be avoided. Had appellant's train come to a stop when near the electric light, the Grand Rapids train would have been discovered. Without any regard to the statutory requirement, the obscurity caused by the electric light made it a matter of prudence to come to a stop before taking such a plunge into the shadows over the crossing of another railroad.

The proximate cause of the accident and injury to appellee was not any action on the part of the city in placing an electric light at a street crossing, nor any action of the employes of the Grand Rapids road, who rightfully occupied the crossing with their train, but the negligence of the employes of appellant's train in approaching the crossing without first ascertaining that the way was clear. There was nothing in the way that they were not required to guard against, even if the statute had not prescribed that the train should come to a full stop before passing over the crossing.

In *Grand Rapids, etc., R. R. Co. v. Ellison*, 117 Ind. 234, the engineer had stopped his train 700 feet from the crossing of another railroad, and then started on, not stopping again until the accident occurred. The court said: "This was not only negligence, but the

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grossest kind of negligence. It was the duty of the engineer to move his train to a point near the crossing and bring it to a full stop, and then ascertain whether there was a train on the other railroad in sight or approaching said crossing."

The duty of those in charge of a railroad train to take care to avoid collision with a train on another road cannot be less than the duty of a traveler on the highway to avoid collision with a train at a railroad crossing. If means are not provided by which a collision is rendered impossible, then the rule to stop and look and listen cannot be less imperative when two trains are liable to crash together than it is when one train is liable to crash into the traveler's vehicle.

As to the traveler's duty in such case, it was said in *Smith v. Wabash R. R. Co.*, 141 Ind. 92, citing many cases: "In attempting to cross, the traveler must listen for signals, notice signs put up as warnings, and look attentively both ways for approaching trains, if the surroundings are such as to admit of that precaution. If a traveler by looking could have seen an approaching train in time to avoid injury, it will be presumed in case he is injured by collision, either that he did not look, or, if he did look, that he did not heed what he saw; such conduct is negligence *per se*." It could not be contended in the case before us, and it is not so contended, that if the engineer had moved his train to a point near the crossing and then brought it to a full stop, as said to be necessary in *Grand Rapids, etc., R. R. Co. v. Ellison, supra*, he could not have seen the train standing before him on the other track, and so have avoided the collision.

Objection is made to certain evidence given by appellee's wife as to the condition of his health. We do not find that the question or answer complained of

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was incompetent. The rule as to evidence given by a nonexpert witness in such a case is well stated in *Carthage Turnpike Co. v. Andrews*, 102 Ind. 138: "He must, in all cases, so far as possible, state the facts upon which he bases his opinions. When the case is one in which all the facts can be presented to the jury, then no opinion can be given, because the jury are as well qualified as the witness to form a conclusion. But there are cases where the witness cannot put before the jury, in an intelligible and comprehensible form, the whole ground of his judgment or opinion. When questions as to the conditions of the mind and body are the questions in issue, there are often many things in the acts, deportment, and appearance of the party which create a fixed and reliable judgment in the mind of the observer that cannot be conveyed in words to the jury. That a person appears to be sad or sick may well be known by observation, and yet there is no way to describe the appearance except by the words that necessarily embody the conclusion reached by observation. In such cases, if the witness states that he is acquainted with, has had opportunity to, and has observed the party, this, it has been held, is sufficient to render the witness competent to state the condition of the party mentally or physically." Under the rule so stated we think the admission of the evidence in question was not error.

Neither was there error in admitting evidence as to appellee's earning capacity as a physician. Such evidence was proper as a means of enabling the jury to arrive at the proper measure of damages. *City of Logansport v. Justice*, 74 Ind. 378, 39 Am. Rep. 79.

Complaint is also made of instructions given, and of the refusal to give other instructions asked. What we have said in considering the first paragraph of the



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Dickson v. Conde et al.

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complaint shows that the court did not err in this respect.

We think the case was fairly tried.

Judgment affirmed.

MONKS, J., took no part in the decision of this case.

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DICKSON v. CONDE ET AL.

[No. 18,082. Filed April 29, 1897. Rehearing denied June 24, 1897.]

CONTRACTS.—*Statute of Frauds*.—Where, as a part of the consideration for the sale and transfer of a one-half interest in partnership property, the purchaser agreed to pay the indebtedness of the firm, and to pay the retiring partner one-half of the amount of a judgment against the firm if it is reversed on appeal, it is not in either of its aspects a contract to answer for the debt, default, or miscarriage of another within the statute of frauds. p. 280.

SAME.—*Construction*.—*Provision Following the Signatures of the Contracting Parties*.—A provision immediately following the signatures of the parties to a written contract is to be construed as a part of the contract, though such provision is not signed, where the words "This agreement is further continued below," appear just above the signatures of the contracting parties. p. 281.

From the Marion Superior Court. *Reversed*.

W. W. Herrod and W. P. Herrod, for appellant.

A. P. Stanton and A. F. Denny, for appellees.

MONKS, J.—Appellant brought this action against appellees upon a written contract. Appellees' separate demurrers to the complaint were sustained, and appellant refusing to plead further, judgment was rendered upon demurrer in favor of appellees.

These rulings of the court have been assigned as error.

It is shown by the complaint that prior to April 29, 1876, appellant and the appellee, Wallace Dickson,

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Dickson v. Conde *et al.*

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were doing business as partners under the firm name of C. Dickson & Co. That on said day, by contract in writing, appellees purchased of appellant his entire interest in the stock, good will, and accounts of said firm of C. Dickson & Co. for the consideration of nine thousand dollars, and assumed and agreed to pay the indebtedness of said firm. That before the sale to appellees a judgment had been recovered for \$5,786.33 by the Indianapolis Cotton Manufacturing Company against said firm, which was on the day of said sale pending on appeal in this court, and was counted and treated as an indebtedness of said firm in said sale, which said appellees were to pay. As a part of said contract it was agreed that in case the appeal to the Supreme Court from said judgment was decided in favor of C. Dickson & Co., then appellees promised and agreed to pay one-half of the amount of said judgment to appellant. That said judgment was reversed in 1878 and remanded to the court below where the case was dismissed. That the one-half of said judgment, \$2,893.16, with interest thereon is due and unpaid. The written agreement is filed with and made a part of the complaint.

The contract, as sued upon, is not, as claimed by appellees, an undertaking "to answer for the debt, default, or miscarriage of another." The contract of appellees is to pay a part of their own debt to appellants to the creditors of the firm, and was not therefore within the statute of frauds. Such contracts may be enforced if not in writing. *Wolke v. Fleming*, 103 Ind. 105, and cases cited; *Turpie v. Lowe*, 114 Ind. 37, 38; *Bateman v. Butler*, 124 Ind. 223, 225; *Boruff v. Hudson*, 138 Ind. 280, 283; *Lowe v. Hamilton*, 132 Ind. 406, 409.

The agreement by appellees to pay appellant \$2,893.16 in the event the case pending in this court

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*Dickson v. Conde et al.*

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was reversed, and the firm of Dickson & Co. were not indebted to said Indiana, etc., Manufacturing Co., was nothing more than an agreement to pay the price of the property purchased to the seller instead of to one of the firm creditors, and was not therefore within the statute of frauds.

It is insisted by appellees that the part of the contract upon which the right to recover the \$2,893.16 is predicated was never signed by the appellees, and that they are not, therefore, liable thereon.

The contract sued upon sets out the agreement in regard to what is sold to appellees, the price to be paid, and the debts of the firm assumed and to be paid. After these provisions follows the testimonium clause, and after this and above the signatures of the three contracting parties, the appellant and appellees in this action, was written the following: "This agreement is further continued below."

Below the signatures of the contracting parties follow the provisions in regard to the appeal from said judgment pending in this court and the payment to be made to appellant in case the same is reversed, etc., at the end of which there is another testimonium clause of the same date as the first one. No names appear following the last testimonium clause.

Appellant and appellees have said in writing over their signatures that what precedes their signatures does not contain all the contract between them, but that what follows below is a part thereof, and it is so alleged in the complaint. These allegations are admitted by the demurrers and clearly makes what is written below their signatures a part of the written agreement.

While it would have been proper for the parties to have signed the testimonium clause which follows the provisions written below the signatures in regard to

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*Leatherman et al. v. Board of Commissioners of Orange County.*

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the payment to appellant of one-half of the amount of said judgment, yet the failure to do so cannot be held to overthrow the express declaration of the parties that the same is a part of the contract. It is well settled that the parties to a written agreement may make a writing on another paper or on the same paper a part of the agreement by so providing, in the agreement signed.

Besides the rigid rule which applies to connecting writings on different papers or on the same paper by parol evidence when the contract is within the statute of frauds does not apply to the contract in this case because it is not within the statute.

It follows that the court erred in sustaining said demurrers to the complaint.

Judgment reversed, with instructions to overrule the separate demurrer of each appellee to the complaint, and for further proceedings not inconsistent with this opinion.

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LEATHERMAN ET AL. *v.* BOARD OF COMMISSIONERS OF  
ORANGE COUNTY.

[No. 18,808. Filed June 24, 1897.]

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**APPEAL AND ERROR.**—*Failure to File Brief Within Sixty Days.—Dismissal.*—The rule of the Supreme Court requiring appellant to file brief before the expiration of sixty days from the date of submission is mandatory in the absence of a written request from the appellee; and the filing of a brief after the expiration of the time and before the dismissal will not serve to rescue the case from the operation of the rule.

From the Orange Circuit Court. *Appeal dismissed.*

*J. A. Zaring, M. B. Hottel and T. B. Buskirk, for appellants.*

*L. C. Wright and W. J. Throop, for appellee.*

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PER CURIAM.—This appeal was submitted December 11, 1896, and notice issued to the parties.

The record discloses that appellants filed their first brief on February 10, 1897. Rule twenty of this court requires the appellant to file his brief before the expiration of sixty days from the date of submission.

According to the recognized method of computing time under the code, the last day allowed for the filing of appellants' brief, was February 9, 1897, and as this day did not fall upon Sunday, the brief was not filed in time. *Schoonover v. Irwin*, 58 Ind. 287; *Hogue v. McClintock*, 76 Ind. 205; Elliott App. Proc., section 449. This rule is mandatory, and in the absence of the written request of the appellee as provided by it, the clerk of this court must dismiss the appeal for the failure of the appellant to file his brief within the time required, and in the event the clerk neglects to discharge this duty, the court will, on its own motion, order the dismissal. The fact that the appellant, before the appeal is dismissed, but after the expiration of the allotted time, has filed a brief, will not serve to rescue the case from the operation of the rule; neither is its requirement subject to be waived by the appellee, except by the method therein provided. *Manss Bros. Boot and Shoe Co. v. Templeton* (Ind. Sup.), 44 N. E. 1108. For the reason stated, it is ordered by the court that this appeal be and the same is hereby dismissed.

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EDSON v. THE STATE.

[No. 18,084. Filed September 14, 1897.]

CRIMINAL LAW.—*Larceny.—Indictment.—Description of Articles Stolen.*—Failure to sufficiently describe part of the articles alleged to have been stolen will not render an indictment bad where addi-

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tional articles sufficient to constitute a public offense, if those questioned were omitted, were properly charged in such indictment.

**SAME.—Evidence.—Larceny.**—A charge of theft in stealing several articles is not defeated if the proof show the stealing of but few of such articles.

**SAME.—Larceny.—Ownership of Property.—Proof.—Variance.—Statute Construed.**—Where an indictment charges the stealing of the property of V, and the evidence shows that it was in his possession as bailee, there is no variance or failure of proof, under the provision of section 1822, Burns' R. S. 1894 (1753, R. S. 1881), that when any offense is committed in relation to property which, when the offense was committed, was in the possession of a bailee, the indictment may allege the ownership to be in either the bailee or bailor.

From the Knox Circuit Court. *Affirmed.*

*James P. L. Weems*, for appellant.

*W. A. Ketcham*, Attorney-General, and *Merrill Moores*, for State.

HACKNEY, J.—The appellant was charged and convicted in the lower court of having unlawfully and feloniously stolen, taken and carried away "six razors, of the value of ten dollars; two finger rings, of the value of three dollars, one pair of hair clippers, of the value of two dollars, and one pair of scissors, of the value of one dollar,"—of the personal goods of John Vincent. It is insisted that the indictment charged no public offense for the reason that the razors and the rings were not described and valued separately; it being insufficient, as claimed, to describe them collectively. This objection to the indictment wholly ignores the fact that additional articles, charged and valued separately, may be sufficient, in charging a public offense, if those questioned were omitted.

A charge of theft in stealing many articles is not defeated if the proof show the stealing of but few of such articles. Wharton's Crim. Ev., section 132; *Wiley v. State*, 3 Cold. (Tenn.), 362; *Alderson v. State*, 2 Tex. App. 10; *State v. Nipper*, 95 N. Car. 653.

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The reason supporting this rule of evidence would uphold an indictment insufficiently describing one of several stolen articles. It has, however, been decided by this court that an indictment is not bad if one of several alleged stolen articles is not sufficiently described. *Shafer v. State*, 74 Ind. 90. We do not hold the descriptions mentioned to be insufficient, but do hold that if they were, the indictment would not be bad on motion in arrest of judgment for failure to state a public offense. Upon the principle already stated, and the authorities cited, the appellant's objection that there was no proof of the larceny of all the articles charged must fail.

It is further urged that a ring, traced to the appellant's possession, was proven to have been the property of the infant daughter of John Vincent, and that there was therefore a variance between the charge and the proof, as to the ring.

The evidence, without contradiction, proved that the ring was in the custody of John Vincent as a bailee and, under the statute, section 1822, Burns' R. S. 1894 (1753, R. S. 1881), there was no variance or failure of proof. The evidence for the State was sufficient to sustain the conviction, and we cannot consider the conflict in the evidence raised by testimony for the defense in contradiction of that for the State.

The record discloses no error and the judgment is affirmed.

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 SHOBE, ADMINISTRATOR, v. BRINSON ET AL.

[No. 18,098. Filed September 14, 1897.]

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150	112
151	192

**DESCENT AND DISTRIBUTION.—Widow's Share of Real Estate.—Mortgage.**—Where a widow's interest in the real estate of her deceased husband is sold and conveyed to pay her husband's debts secured by a mortgage thereon, she is entitled to be reimbursed for the full

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value of her share therein out of other assets of the estate, real or personal, if any, and such claim is preferred and must be paid before the claims of general creditors. *pp. 288-292.*

**EXECUTORS AND ADMINISTRATORS.**—*Modification of Judgment.*—*Practice.*—An administrator cannot object to the judgment entered in favor of the widow upon her cross-complaint in a proceeding instituted by the administrator to sell the real estate to pay the debts of the decedent, where the modification proposed does not affect the finding of the court that the land was not subject to sale by him. *p. 293.*

From the Montgomery Circuit Court. *Affirmed.*

*W. D. Jones, Benjamin Crane, and A. B. Anderson,*  
for appellant.

*G. W. Paul, H. D. Van Cleave and J. M. Davis,*  
for appellees.

MONKS, J.—This proceeding was commenced by appellant filing a petition to sell certain real estate, to make assets to pay the debts of the decedent, Amey R. Brinson. Martha J. Brinson, the widow of said decedent, filed her cross-complaint, alleging, in substance, that "Amey R. Brinson died intestate in said county of Montgomery, on June 4, 1894, leaving as his sole and only heirs at law his widow, Martha J. Brinson, and four infant children; that appellant was duly appointed administrator of the estate of said decedent, who died seized in fee simple of two tracts of real estate, one of 80 acres and the other of 53.55 acres; that the 80-acre tract was subject to a mortgage executed by Amey R. Brinson and his wife, Martha J. Brinson, in July, 1893, to secure a promissory note given by said Brinson, now deceased, for \$3,500.00, the balance of the purchase money for said 80-acre tract; that said mortgage and current taxes, amounting to about \$50.00, were the only liens on said real estate; that the decedent also died the owner of personal



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property of the value of about \$567.00; that appellant, as administrator of the estate of said decedent, obtained an order of the Montgomery Circuit Court, to sell said 80-acre tract to pay said mortgage lien on said real estate, and sold the same for \$585.75 in excess of said lien; that by the sale of said 80-acre tract of land said mortgage debt has been fully paid and discharged, and she has lost her interest therein as widow, which she alleges to be of the value of \$1,500.00, and that she held said one-third interest in said 80 acres of land against all persons except said mortgagee; that appellant has paid her the \$500.00 due her as widow, under the statute; that there is now due the general creditors of the estate, debts aggregating about \$2,000.00, in addition to her vested interest in said estate as widow of said decedent; that since the sale of said 80-acre tract, she brought an action in the Montgomery Circuit Court, to which appellant was a party, and by the order and judgment of said court her undivided one-third of said 53.55-acre tract of land was set off to her in severalty; that the part so set off contains 17.50 acres, and that the real estate described in appellant's petition, which he seeks to procure an order to sell, is the part of said 53.55 acres remaining after the one-third in value thereof was set off to her; that said 53.55 acres of real estate was at said time, and is now, of the value of \$2,100.00, and the part (17.50 acres) set off to her was and is worth \$700.00, and the remainder of said 53.55-acre tract, being 36.05 acres, which appellant is asking an order to sell, was and is worth \$1,400.00, and no more; that said appellee is, in equity, the owner of said 36.05 acres, and is entitled to have the same set off to her as against the heirs and all creditors, in lieu of her one-third vested interest in said 80-acre tract sold by said appellant, or if said real estate be sold in this pro-

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ceeding, that she is entitled to have an order requiring appellant to pay her the proceeds of said sale and a sufficient sum out of other money in his hands to make \$1,500.00."

Appellant's demurrer to the cross-complaint was overruled. There was a trial by the court and a finding and judgment in favor of said appellee on her cross-complaint, that said part of the 53.55 tract not set off to her in the partition proceedings be vested in her, and that the administrator pay her the sum of \$100.00, and that she recover her costs, etc. Appellant filed a motion to modify the judgment, which was overruled.

The errors assigned call in question the action of the court in overruling the demurrer to the cross-complaint, and in overruling the motion to modify the judgment.

Under the statutes of this State the right of a widow to one-third of the real estate of her deceased husband is absolute, and she is entitled to the same free from all demands of creditors, except mortgages, in the execution of which she has joined. The waiver of such a right as to the real estate upon which she may have joined with her husband in executing a mortgage operates only in favor of the mortgagee, and not in favor of other creditors or liens. *Sparrow v. Kelso*, 92 Ind. 514, and cases cited; *Hunsucker v. Smith*, 49 Ind. 114, 118; *Perry v. Borton*, 25 Ind. 274. To protect the widow in this right she is entitled to have the personal assets, not required for the payment of claims expressly preferred by statute, applied to the payment of mortgage or other liens necessary to protect her one-third of the real estate, and clear the same of incumbrances. If such assets are not sufficient to protect her said one-third interest, she is entitled to have all the real estate of her deceased husband, that did

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not descend to her as widow, sold and the proceeds applied to payment of liens on real estate so as to protect the interest given her by statute. *Bowen v. Lingle*, 119 Ind. 560, 563; *Sparrow v. Kelso*, *supra*; *State, ex rel., v. Kelso*, 94 Ind. 587, 589, and cases cited; *Hunsucker v. Smith*, *supra*; *Morgan v. Sackett*, 57 Ind. 580, 582, 583; *McCord v. Wright*, 97 Ind. 34; *Matthews v. Pate*, 93 Ind. 443, 445, 446; *Elliott v. Cale*, 113 Ind. 383, 404; *Purviance, v. Emley*, 126 Ind. 419, 421, 422.

In *Sparrow v. Kelso*, *supra*, Elliott, Judge, speaking for the court, said: "In *Perry v. Borton*, 25 Ind. 274, it was held that the widow's rights are paramount, and that the administrator must apply all money, not required for the payment of claims expressly preferred by statute, to the payment of mortgage liens, in order that the widow may receive her one-third of the real estate free from incumbrance. According to the doctrine of that case, neither the heirs nor the general creditors possess any claim which will be allowed to reduce the widow's interest. The same doctrine is asserted in *Hunsucker v. Smith*, 49 Ind. 114, where it was said: 'It is his duty as administrator of the estate, and she,' (the widow) 'has a right to require him, to make his claim out of other assets, personal and real, if he can do so after the payment of such expenses above named as have preference, and thereby save to her the third of the land to which she would be entitled except for the mortgage.' The case of *State, ex rel., v. Mason*, 21 Ind. 171; *Clarke v. Henshaw*, 30 Ind. 144; *Newcomer v. Wallace*, 30 Ind. 216, are referred to as declaring the same general principle. It must, therefore, be held that it is the duty of an administrator to apply all money, not needed to pay claims expressly preferred by statute, to the payment of liens on real estate so as to secure to the widow one-third of the real

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estate given her by our statute. There are other cases sustaining the principle which we declare to have a firm place in our law of property. *Morgan v. Sackett*, 57 Ind. 580; *Medsker v. Parker*, 70 Ind. 509; *Haggerty v. Byrne*, 75 Ind. 499; *Leary v. Shaffer*, 79 Ind. 567. The conclusion from the general principle we have stated necessarily is, that a widow has a right to require the administrator of her husband's estate to take all steps required by law to secure her interest in her share of her husband's estate."

When the real estate of the decedent, including the widow's interest therein, is sold by the administrator to discharge a lien thereon, the widow is entitled, not to one-third of the proceeds remaining after the payment of such lien, but to one-third of the gross proceeds of the sale, provided that sum remains after the lien is paid. Section 2504, Burns' R. S. 1894 (2349, R. S. 1881).

It was held by this court in *McCord v. Wright*, *supra*, that when a widow's interest in the land of her deceased husband is sold to pay her husband's debts secured by a mortgage thereon, she has an equitable claim against her husband's estate to be reimbursed, out of the personal estate in the hands of the administrator, for the full value of her share of said lands so sold and conveyed away from her, and that such claim takes precedence and is entitled to be paid before the claims of general creditors. This decision was the necessary and logical result of the cases cited, which declare that the widow is entitled to have the personal assets and the proceeds of the sale of all the real estate of her deceased husband that did not descend to her, not required for the payment of claims expressly preferred by statute, applied to protect her interest in the real estate of her deceased husband. That is, she has an equitable claim to be reimbursed out of

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the fund which the law required the administrator to apply to the protection of her interest as widow in the real estate of her deceased husband, which he failed to do, by reason of which failure the same, or a part thereof was lost to her. The doctrine declared in *McCord v. Wright, supra*, applies, therefore, to a case where the fund, out of which the widow seeks to be reimbursed, is derived from the sale of real estate, the same as if the fund was the proceeds of the personal estate. This doctrine does not conflict with what was said by this court in *Fowler v. Maus*, 141 Ind., on p. 51, because the court was then speaking of the rights of the widow in the real estate of her deceased husband, as against the holders of mortgages and other liens which bound said real estate, including her interest therein as widow, and not such right as against all other persons. It may be regarded as settled law that, if a widow's interest in the real estate of her deceased husband is sold and conveyed to pay her husband's debts, secured by mortgage thereon, she is entitled to be reimbursed for the full value of her share therein out of other assets of said estate, real and personal, if any, and such claim is preferred and must be paid before the claims of general creditors. *McCord v. Wright, supra*; *State, ex rel., v. Kelso, supra*, p. 589; *Elliott v. Cale, supra*, p. 404.

It was said in *McCord v. Wright, supra*, at p. 39: "The claim is founded on rules, both of law and equity, higher and more favored even than the doctrine of subrogation. This court has always held that the provision for the widow in the lands of her deceased husband, under our statute of descent, is a substitute for dower under the common law, and is to be equally as favored and protected by the courts as her former right of dower." It follows, that if a man die the owner of several tracts of real estate, leaving a widow, or a widow

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and children surviving him, and a part of said real estate is subject to a mortgage executed by him in his lifetime, in the execution of which his wife joined, that one-third of all his real estate may be set off to her in one body, and if set off in the part covered by the mortgage, it is the duty of the administrator to apply the personal estate in the order prescribed by statute to pay said mortgage debt, and if the same is insufficient for that purpose, to sell so much of the real estate, not set off to the widow, as is necessary to pay the balance, and thus carry out the directions of the statute, that she is to have one-third of all the real estate of which her husband died seized. The only exception to this rule is that when the real estate exceeds in value ten thousand dollars, the widow is only entitled to one-fourth, and when the real estate exceeds in value twenty thousand dollars she is only entitled to one-fifth as against creditors. Sections 2502, 2640, Burns' R. S. 1894 (2347, 2475, R. S. 1881).

It follows that said appellee, after the 80-acre tract was sold to pay said mortgage lien, was entitled to have all or so much of the 53.55-acre tract set off to her as was equal in value to one-third the value of both tracts, less whatever sum, if any, she may have received from the gross proceeds of the sale of the 80-acre tract. It is alleged in her cross-complaint that only her one-third interest in the 53.55-acre tract was set off to her in the partition proceedings. The necessary conclusion is, that if the part of the 53.55-acre tract not set off to said appellee is sold by the administrator, that she is entitled to be reimbursed out of the proceeds of the sale, for such part of the value of her one-third of the 80-acre tract, as has not been already paid to her out of the proceeds of the sale thereof or out of the proceeds of the personal estate. It is clear that said appellee was entitled to some relief under

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her cross-complaint, and the court did not err therefore in overruling the demurrer thereto.

Appellant's motion to modify the judgment is by striking out all that part of the judgment vesting the real estate in said appellee, and quieting the title thereto in her, and also that part ordering him to pay said appellee the sum of one hundred dollars, "for the purpose of reimbursing her for the difference between the value of the land vested in her by decree, and the value of her one-third interest as widow in the 80 acres of land heretofore sold," etc. The part of the motion to strike out that part of the judgment ordering appellant to pay said appellee \$100.00, was properly overruled because it was within the issues and was supported by the finding. The court below found against appellant and in favor of the defendants, on his petition to sell the real estate. If he had no right to sell the real estate, as found by the court, he had no interest in any judgment in regard to the same. If the same was not subject to sale, by appellant as administrator, as found by the court, which is admitted for the purpose of the motion to modify, the children of the deceased were the only persons who could object to the judgment vesting and quieting the title thereto in the widow. They have not filed any motion to modify the judgment or excepted or objected to it in any way, and we need not and do not determine whether such part of the motion if made by them would be sustained or overruled.

The court did not err therefore in overruling appellant's motion to modify the judgment.

No available error appearing in the record the judgment is affirmed and the costs adjudged against the intervener, Hector S. Braden.

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The City of Richmond *et al.* v. Smith.

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## THE CITY OF RICHMOND ET AL. v. SMITH.

[No. 18,187, Filed September 16, 1897.]

**MUNICIPAL CORPORATION.—Market.—Nuisance.—Injunction.**—A property owner who owns the fee in a part of a street set apart by a city as a market place, and whose access to her lot is thereby appreciably impeded, and a nuisance created at her door, is entitled to injunctive relief against the maintenance of such market.

From the Wayne Circuit Court. *Affirmed.*

*A. C. Lindemuth*, for appellants.

*R. A. Jackson, H. C. Starr and J. F. Robinson*, for appellee.

HOWARD, J.—This was an action brought by the appellee to enjoin the appellants, being the city of Richmond and Edwin O. Dunham, market master of said city, from maintaining a market place upon a public street adjoining her premises.

The facts were found by the court, and are not in dispute. They are substantially as follows: The appellee is the owner of a lot fronting 100 feet on North A street between Fourteenth and Fifteenth streets in the city of Richmond. Said street is a public highway eighty feet in width, with sidewalks each fourteen feet wide, leaving a roadway fifty-two feet in width. The sidewalks and roadway are graveled and macadamized, and the gutters bouldered. On July 16, 1894, the common council of the city, at a regular meeting, by resolution duly passed, designated the south side of North A street, between Fourteenth and Fifteenth streets, as and for a market place, and directed the appellant, Dunham, to hold public markets



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thereat, on Tuesdays, Thursdays, and Saturdays of each week, from the first day of June to the first day of November in each year, and from 5 o'clock a. m. to 9 o'clock a. m. on each of said days. Such markets were so held from July 21, 1894, until September 20, 1894, when they were restrained by the court. No market house or other structure, permanent or temporary, was erected or attempted to be erected on said street. The manner of holding the said market was to back the market wagons to the curb, the horses attached to the wagons facing the center of the street, the teams being about three feet apart along the sidewalk. Tables or temporary stands were stationed on the sidewalk for the display of vegetables and other products. The south half and also a part of the north half of North A street was left open for public travel. After the market hours of each day the street was at once cleaned up, and all refuse which had accumulated was removed. No residences front on the part of the street where the market was held, except that a side door and window of appellee's house look out upon said portion of said street. All the owners of lots fronting on said market place, except appellee, consented to the location of the market; but the market was located and held without her consent, against her wishes, and over her protest. The average number of wagons on market days was about thirty-five, and many people attended. The horses stamped and neighed, also befouled the street and attracted great numbers of flies. No legal proceedings of any kind, except the resolution aforesaid, were ever had for the appropriation of the street for such market, nor were any compensation or damages ever paid or tendered to appellee for such occupation of the street. The real estate of appellee and the said market place are in the residence part of the city. The occupants of appel-

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lee's house were disturbed in their rest and sleep by the arrival of the market gardeners and the opening of the market in the early morning hours. The court found as a conclusion of law that the appellee was entitled to the injunction prayed for by her, and judgment was entered accordingly.

No good reason can be given to show that the judgment should not be affirmed. The streets are primarily for the use of the traveling public. Certain other uses in which the public and the abutting property owners are interested are also allowed, but only in such manner and to such extent as may not appreciably impede the use for public travel. Such uses are those for sewers, gas, and water pipes, also telegraph and telephone lines. Provision, too, is made for shade trees along the curb and between the roadway and the sidewalks. No right, however, as we think, could be exercised by a city for such an occupancy of a public street as that which was here attempted.

It is true, that under clauses 11, 29, and 33 of section 3541, Burns' R. S. 1894 (3106, R. S. 1881), cities have power to establish and regulate public markets. But this can give no right to establish such markets in the streets of the city. The statute contemplates the use by the city of its own lands for the location of public markets. Such was the case in *City of Fort Wayne v. Shoaff*, 106 Ind. 66.

Reference is made to sections 3544-3546, Burns' R. S. 1894 (3107-3109, R. S. 1881), which provide that a market house may not be erected on a public street without the written consent of two-thirds of the owners of lots on such street opposite to the place where such market house is proposed to be constructed. Whether such a statute would be held valid so as to authorize such use of the street, particularly without the consent of all of the abutting property owners, we need

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Dennis, Administrator, v. Holsapple.

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not inquire, inasmuch as no such case is here presented.

It is not necessary, as we think, to give reasons or cite authority to show that such a use of a public street as contemplated in the case before us, cannot be authorized. Appellee's fee simple right in the street was taken for uses not authorized by law, the access to her lot was appreciably impeded, and a nuisance was created at her door. She was therefore injured in a manner different in kind and in degree from the general public, and hence had a right to maintain the action brought by her.

Judgment affirmed.

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DENNIS, ADMINISTRATOR, v. HOLSAPPLE.

[No. 18,299. Filed September 16, 1897.]

**WILLS.—Name of Beneficiary.**—It is not essentially necessary that the testator, in his will, name the legatee or devisee, in order to give effect to the bequest; it is sufficient if the beneficiary is so described therein as to be ascertained and identified. *p. 301.*

**SAME.—When Beneficiary Not Named in Will.—Parol Evidence.**—Where a testatrix devised all of her property to whoever should, at her request, take care of her, providing that the person so selected should have a written statement to that effect, signed by the testatrix, such will is not invalid on account of failure to name a devisee, and a letter written by testatrix to her granddaughter after the execution of the will, telling her that she was sick and requesting her to come and take care of her, informing her that she had made her will and that it was her desire that she should have all of her estate, was admissible in evidence for the purpose of identifying the devisee. *pp. 298-305.*

148 297  
161 599

From the Washington Circuit Court. *Affirmed.*

*Harvey Morris and Alsbaugh & Lawler*, for appellant.

*John A. Zaring and M. B. Hottel*, for appellee.

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Dennis, Administrator, v. Holsapple.

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JORDAN, J.—This was a proceeding in the lower court by the appellee, Ella Holsapple, to secure a construction of the last will of Emily J. Shull, deceased, and to obtain an order directing the appellant, the administrator, to turn over to the former certain property to which she claimed to be entitled as a devisee under the will in question. She prevailed in the action and obtained the relief demanded. Prior to the institution of this proceeding the will had been duly probated, and appellant appointed as administrator of the estate with the will annexed. The errors assigned are based upon the sufficiency of the complaint upon demurrer, and overruling appellant's motion for a new trial. The will over which the controversy arose was duly executed by Emily J. Shull on April 9, 1889, and was probated in the circuit court of Washington county, Indiana, January 7, 1896, in which county the testatrix resided and died. The will, omitting the attesting clause, is as follows:

"The following is the last will and testament of Emily J. Shull, of Salem, Indiana, to-wit: So far as my property which I leave at my death is concerned, I declare the following to be my desire and will: 1. Any valid debts due from me at my death shall be paid. 2. I command that my funeral at my death shall be decent and rendered in a proper manner. 3. Also I direct my executor to erect at my grave a proper monument not to cost less than seventy-five dollars (\$75.00). 4. Whoever shall take good care of me and maintain, nurse, clothe, and furnish me with proper medical treatment at my request, during the time of my life yet, when I shall need the same, shall have all of my property of every name, kind, and description left at my death. 5. The person, or persons, whom shall be selected by me to earn my estate, as provided in 4th clause, shall have a written statement signed by me

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to that effect to entitle her, him, or them to my estate. 6. Samuel B. Voyles of Salem is nominated for my executor of this will."

On January 6, 1895, the testatrix wrote and sent the following letter to the appellee: "Well, Ella, I am sick; I want you to come and stay with me. I don't think I can live many weeks; if you don't come I will try and get some of Lina Clark's to stay. If you don't come you will rue it. I have made my will, and whoever stays with me at my last hours gets everything I leave, except funeral expenses paid. I don't want your father or the Shulls to have a cent of my earnings, and want you to have everything I have after my death and funeral expenses are paid. Don't fail to come."

This letter, together with the will, upon the trial, over appellant's objections was admitted in evidence. There is no controversy over the facts. Among other things it was admitted by the parties upon the trial, that appellee was the granddaughter of the testatrix and the person to whom the letter above set out was addressed. That she received the same and in response to the request therein, she came and remained with Mrs. Schull, waited upon, and took care of her until she died. The contention, substantially, of appellant's learned counsel is: (1) That the will is invalid for the reason that it does not name any devisee; (2) that the testatrix undertook by her pretended will to reserve to herself the right or power to name the beneficiary by the written statement mentioned in the will, and which was written after the execution thereof. They further insist that the person to whom Mrs. Schull attempted to bequeath her estate is not made certain by the will, and that the latter does not furnish the means by which a devisee can be identified.

For any and all of these reasons they insist that,

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under the law, the will is void and the court erred in admitting it and the letter in question in evidence, and in hearing evidence to identify appellee as the beneficiary under the will.

We concur with the contention of counsel for appellant, that a testator, under the law, is not authorized or invested with the power of reserving in his will the right to name or appoint a legatee or devisee by means of a written statement, or instrument of the character or kind as is the letter heretofore referred to and set out in this opinion. Neither are courts permitted to receive extrinsic evidence in order to add to, vary, or change the literal meaning of the terms of a will, or to give effect to what may be supposed or presumed to have been the unexpressed intention of the testator. However, it is a well affirmed legal principle, that a will may be explained by such evidence—*first*, as to the person intended; *second*, the thing intended; *third*, the intention of the testator, as to each, when the employment of such evidence does not result in making more or less of the will than its terms import. Or, in other words, the law never opens the door to parol evidence in order to add to or take from such instruments, but for the legitimate purpose only of applying their terms or provisions to the objects or subjects therein referred to, and in order to reach a correct interpretation of such language or terms as are therein expressed. *Grimes' Executors v. Harmon*, 35 Ind. 198, 9 Am. Rep. 690; *Daugherty v. Rogers*, 119 Ind. 254; *Sturgis v. Work*, 122 Ind. 134; *Hartwig v. Schiefer*, 147 Ind. 64.

Courts, however, in the main, entertain great respect for the will of those who are dead, and it is always their earnest desire to carry into effect the terms and provisions thereof, and it is only when the instrument violates, or is not in accord with the well settled

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rules of law, or is utterly uncertain, that the carrying out of the disposition of the estate thereunder is denied. The authorities fully affirm the rule that it is not essentially necessary that the testator, in his will, name the legatee or devisee, in order to give effect to the bequest. It is sufficient, if he is so described therein as to be ascertained and identified. 1 Redfield on Wills, p. 274; see Schouler on Wills, sections 573, 584, 585, 586, 592, and 593; Beach on Wills, p. 148, section 83; *Cheney v. Selman*, 71 Ga. 384; *Hart v. Marks*, 4 Bradford's Reports (N. Y.) 161; *Stubbs v. Sargon*, 2 Keen (Eng. Ch.) 255; 14 Eng. Ch. Reports, 507. Extrinsic evidence, however, in such cases does not create the devisee or legatee, but only serves to point out the person intended as such by the testator in his will.

In *Hart v. Marks*, *supra*, in course of the opinion, it is said: "Parol proof may always be used to apply the will—that is, to ascertain the person intended by the testator, by a description. \* \* \* It is entirely competent to point out by proof the person who answers the description of a legatee, as contained in the will." The will involved in the case of *Stubbs v. Sargon*, *supra*, devised certain freehold estates to trustees, the annual income of which was to be paid to the sister of the devisor, during the life of the former, and after her death to dispose of the estate to the partners of the testatrix who should be in partnership with her at the time of her death, or to whom she might have disposed of her business. The court held in that appeal that this was a good devise to the persons to whom it was ascertained, that the testatrix had disposed of her business, in her lifetime.

In 1 Redfield on Wills, p. 275, the learned author in his comments upon this decision says: "This was regarded as nothing more than a description of the leg-

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atee, instead of naming him, and we suppose the right to do that was never questioned. And whether the legatee were to be ascertained, at the date of the will, or at the death of the testator, or upon the determination of an intervening estate, which should only begin at the decease of the testator, has never been considered material. One may give real or personal estate to his wife, to the children of his brother, or to the next of kin of the testator, after the decease of all his lineal descendants, and in all of these cases, and in many others, the devise may be so expressed as to raise a serious question, not only in regard to the identity of the persons, which may be ascertained by resort to extraneous evidence; but also, as to the period at which the description of persons, or classes, is to be applied, and this must be removed by legal construction. But we had never supposed any doubt could exist in regard to the complete disposition of the property under such a devise."

In the light of the principles declared and supported by the authorities to which we have referred, and others of a like import, we may proceed to consider and determine the question involved under the will in controversy. An examination of its terms and provisions discloses that the evident intent and purpose of the testatrix thereunder, was to make at her death, the object of her bounty, the person who, at her request, should take good care of her, and provide for and administer to her wants and necessities as therein provided. The manifest purpose of the provision embraced in clause 5, when construed in connection with clause 4, was to fix or declare what should be the requisite proof of the fact that the person who performed the required services and complied with the conditions imposed by clause 4, had been selected and requested to do so by the testatrix. The written state-



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ment, as mentioned, was to be the evidence of such fact. The provision of clause 5 cannot be considered as a reservation to appoint, in the future, under the written statement referred to, the person who was to take the property bequeathed. The statement or request signed and sent to appellee by Mrs. Shull, in pursuance of this provision in her will, was not testamentary. No one was appointed thereby to take the estate devised. It simply advised appellee of the provisions made by the will, and requested her to come and stay with the testatrix, and could be employed, only as it was upon the trial to aid in the identification of the person described, and declared in the will to be entitled to the bequest. The will, although not skillfully drawn, nevertheless, we think, made a complete disposition of all of Mrs. Shull's estate. It is true, as insisted, that it did not name any particular person as devisee, nor was there anyone at the time of its execution who occupied the *status*, or answered to the beneficiary therein described; still, however, it so designated the person whom the testatrix contemplated and intended should have the estate bequeathed, that he or she, by the means thereof, at her death could be clearly identified and ascertained by the aid of extraneous facts. It was at least in this respect sufficiently certain as to fall within the principle of the ancient maxim of the law: *id certum est quod certum reddi potest*.

The testatrix substantially declared therein, that whoever, at her request, performed the services exacted thereunder, and complied with the conditions imposed, should have all of her property of "every name, kind, and description," and further provided that the person selected by her to serve as mentioned should have the statement referred to in clause 5. These facts were the standard or test by which the beneficiary was to be determined. In the search to

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ascertain the person entitled to the property according to the terms of the instrument, it was legitimate to prove all facts referred to in the will, going to identify such person. 7 Am. & Eng. Ency. of Law, p. 93. The will is not in the condition it would be, had the name of the devisee been entirely blank with no sufficient terms or provisions therein descriptive of the beneficiary intended. Under such circumstances parol evidence could not be invoked, and the will would be void in this respect for uncertainty.

Appellee is the only one who claims, under the will, the property devised. The evidence, together with the agreement of the parties, conclusively shows that she, at the time of the death of the testatrix, occupied the *status*, and in all respects responded to the person described, to whom Mrs. Shull intended her estate to go; while the insistence of appellant's counsel may be contended, that, in making her will, Mrs. Shull left the person whom she thereby intended to become the object of her bequest to depend, in a sense, upon the happening of future events. This person, it is true, depended upon the future volition of the testatrix in being chosen to perform the exacted services, and upon the consent of the latter in accepting the request, and in discharging the obligation imposed by the will; but the subsequent volition exercised by Mrs. Shull in this respect cannot be deemed or considered in a legal sense as testamentary in its nature or character. It is no more so than had she been a *feme sole* at the time she executed her will, and thereby devised her estate to her surviving husband. To illustrate: An unmarried man may make a valid bequest to his wife and children, although he has neither at the execution of the will. If, however, he leaves surviving him either a widow, or children, at his decease, she or they, as the case may be, would take under the will, though not

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sustaining that relation to him at the date of its execution. That this would be the result, under such a will, it is said in a footnote in 1 Redfield on Wills, p. 276, has never been questioned, although the person who became the wife of the testator, depended, in a sense, upon the future will of the testator in making the selection, and also upon the consent of the person who became his wife. Without further extending this opinion we sustain the validity of the will in dispute, and, under the circumstances of the case, the court did not err in admitting in evidence the letter or statement in question, nor in admitting the other facts to prove that appellee was the person who at the request of the testatrix discharged the obligations imposed by the will. The complaint was sufficient for the relief demanded, and the demurrer thereto was properly overruled, and also the motion for a new trial.

Judgment affirmed.

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PLACARD v. STATE, EX REL. SCHOLL.

[No. 18,005. Filed September 17, 1897.]

**APPEAL.—Assignment of Error.—Mandamus.**—On appeal from an order directing the issue of a peremptory writ of mandate, an assignment that the court erred in overruling the demurrer to the "complaint," cannot be considered, where the demurrer was addressed to the alternative writ, and not to the complaint or petition, and the alternative writ is not in the transcript. *p. 307.*

**SAME.—Assignment of Error.—Mandamus.**—On appeal from an order directing the issue of a peremptory writ of mandate, a demurrer to the answer and return of an alternative writ cannot be considered where the alternative writ is not in the record. *p. 307.*

**SAME.—Mandamus.**—Where a peremptory writ of mandate has been ordered by the trial court against a justice of the peace, in his official capacity, assignments of error cannot be considered on appeal where they merely present causes of error on behalf of the appellant as an individual. *p. 308.*

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From the Madison Circuit Court. *Affirmed.*

*Herman F. Willkie and Kittinger & Reardon*, for appellant.

*William F. Edwards, C. K. Bagot and T. Bagot*, for appellee.

HACKNEY, J.—The appellant appeals from an order of the circuit court directing the issue of a peremptory writ of mandate against him as justice of the peace, ordering him, as such officer, to grant to James Scholl a change of venue in an action by the town of Orestes against said Scholl, pending before him, said justice. The petition for the alternative writ was entitled as in a proceeding against Edward S. Placard in his official capacity, and its allegations were as to the official misconduct of said Placard in refusing a change of venue. The court ordered that the alternative writ issue, and, thirteen days later, a demurrer was filed on behalf of the respondent which was addressed “to the writ herein issued.” Said demurrer was overruled and the respondent made “return to alternative writ herein,” in two separate statements, or paragraphs, one in denial, and the other alleging that he had ruled upon all questions presented in the cause, “a transcript of which proceedings are [is] attached to this complaint and made a part thereof, marked ‘Exhibit A’;” that “he is” the only justice of the peace in said town; that he denied Scholl’s application for a change of venue; that Scholl refused to plead further; that judgment was rendered against him and that he prayed an appeal and filed an appeal bond. “Exhibit A,” with the petition, was a copy of the town ordinance the violation of which was charged against Scholl as alleged in said petition, and there was no allegation in the return that at the time the change was denied Placard

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was the only justice of the peace in said town. The court sustained appellee's demurrer to said second return, and upon a hearing the peremptory writ was ordered as prayed. Of the eight causes of error assigned, but two are discussed, namely, that "the court erred in overruling the demurrer to the complaint in this action," and that "the court erred in sustaining a demurrer to the second paragraph of the answer of the appellant and return to the alternative writ of mandate." No alternative writ is in the transcript, and no demurrer was addressed to the "complaint" or petition, the sufficiency of which is discussed by counsel for the appellant. As a question of practice there could be no consideration of the sufficiency of a pleading, under an assignment of a ruling upon demurrer, when no such demurrer was ever filed or passed upon. It is likewise as impossible to determine the sufficiency of a return to an alternative writ when such writ is not in the record. As well could we determine the sufficiency of an answer to a complaint in the absence of the complaint. That a writ was ordered, that a demurrer was addressed to it, and that an answer was addressed to it, not only discloses that the proper practice was observed in the lower court in treating the writ as a complaint, but makes manifest the conclusion that the record in this court is incomplete, and that we are not permitted to measure the sufficiency of the writ, if that question were argued, or of the return made to it.

It is objected that the assignment of error is insufficient in presenting causes of error on behalf of Edward S. Placard as an individual, and not as an official, the capacity in which he was sued. "A writ of mandamus is a command issuing from a court of law of competent jurisdiction in the name of the State or sovereign directed to some inferior court, officer, cor-

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poration, or person requiring them to do some particular thing therein specified, and which appertains to their office or duty." 14 Am. & Eng. Ency. of Law, p. 91. "A writ of mandamus runs only against the officer who is to do the particular official act commanded, and should be addressed to him in his official capacity." 14 Am. and Eng. Ency. of Law, p. 219. By the same authority, p. 220, it is said: "An action for mandamus is to be regarded as a proceeding against the officer, and not against the individual; and when proper papers have been once served upon the officer any proceeding which they warrant may be taken against his successors without commencing *de novo*." To this proposition are cited many authorities. We have no doubt that ordinarily this is true, but whether it is in every case is not so important as the general proposition, supported by the rules above stated, that the respondent is a party in his official capacity, and not as an individual. In no event is there any question upon the merits of the appeal before us.

The judgment of the circuit court is affirmed.

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SUTHERLAND v. CLEVELAND, CINCINNATI, CHICAGO AND  
ST LOUIS RAILROAD COMPANY.

[No. 18,117. Filed September 17, 1897.]

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**PRACTICE.—*Special Verdict.***—A party who makes no demand for a special verdict cannot complain that the demand therefor by the opposite party was not complied with. *pp. 309, 310.*

**EVIDENCE.—*Harmless Error.***—In an action against a railroad company for personal injuries, the refusal of the trial court to admit in evidence an ordinance prohibiting trains from running faster than four miles an hour, was harmless error, where the plaintiff wholly failed to establish her own freedom from negligence contributing to her injury. *p. 310.*

**PRACTICE.—*Negligence.—When Court May Direct Verdict.***—In an action for personal injury, based upon the negligence of defendant,

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plaintiff must aver and prove his freedom from contributory negligence proximately causing his injury, and upon failure of such proof it is the duty of the trial court to instruct the jury to find against him, even though he establish all other essential facts of his cause of action. pp. 310, 311.

**CONTRIBUTORY NEGLIGENCE.—***Railroad Crossing.*—Where a person, attempting to cross several railroad tracks, saw a train coming, and turning back to avoid such train, saw a train coming from the opposite direction on another track which she thought she could pass over before it would reach her, and was struck by such latter train, and was injured, she was guilty of such negligence contributing to her injury in attempting to cross said last track, as to preclude a recovery. pp. 311, 312.

From the Marion Superior Court. *Affirmed.*

*George W. Galvin and Thomas Hanna*, for appellant.

*Byron K. Elliott, William F. Elliott and John T. Dye*, for appellee.

**MCCABE. C. J.**—The appellant sued the appellee to recover damages laid at \$25,000.00, for alleged personal injury inflicted on her by the alleged negligence of the defendant. After the close of the plaintiff's evidence the court on the defendant's motion instructed the jury to return a verdict in favor of the defendant, which it did. After overruling appellant's motion for a new trial, the court rendered judgment on the verdict.

The defendant had at the proper time demanded that the jury be required to make a special verdict, and one of the reasons assigned in the motion for a new trial is that the court failed to require the jury to return a special verdict in accordance with the opposite party's demand. There is nothing in this point. The party who makes no demand for a special verdict cannot complain that the demand of the opposite party was not complied with. Moreover, the appel-

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lant has waived the point, even if there was anything in it, by failing to discuss it in her brief.

Another ground of the motion is the refusal of the trial court to admit in evidence an ordinance of the city prohibiting trains from running faster than four miles an hour. The object of this evidence, we are informed, was to establish negligence on the part of the defendant railway company by showing that the train that struck the appellant was running at a greater rate of speed than four miles an hour. Without deciding the many objections urged to the admissibility of the ordinance, and conceding without deciding that it was error to exclude it as evidence, it is insisted that such supposed error was harmless because there was another element in appellant's case which she wholly failed to establish by the evidence, namely, her own freedom from negligence contributing to her injury.

As was said in *Oleson v. Lake Shore, etc., R. W. Co.*, 143 Ind. 405: "It is thoroughly settled that if the facts are undisputed, and only one inference can be reasonably drawn from them, the question of whether there is or is not contributory negligence is one of law for the court. \* \* \* We think it is also correct doctrine that where the evidence given at the trial with all the inferences which the jury may justifiably draw from it is insufficient to support a verdict for the plaintiff so that such verdict, if returned, should be set aside, the court is not bound to submit the case to the jury but may direct a verdict for the defendant. \* \* \* It is essential to appellant's right to recover that he aver and prove that he was free from negligence proximately causing his injury. *Cincinnati, etc., R. W. Co. v. Duncan*, 143 Ind. 524, and cases cited; *Smith v. Wabash, etc., R. R. Co.*, 141 Ind. 92, and cases cited; *Cincinnati, etc., R. W. Co. v. Howard*, 124 Ind. 280, 8 L. R. A. 593; *Mann v. Belt R. R., etc., Co.*,



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128 Ind. 138, 19 Am. St. 96, and cases cited; *Pennsylvania Co. v. Meyers, Admx.*, 136 Ind. 242, and cases cited. If he fails to prove this essential and indispensable element of his cause of action, it was the duty of the trial court to instruct the jury to find against him, even though he established all the other essential facts of his cause of action." See, also, *Lake Erie, etc., R. R. Co. v. Stick*, 143 Ind. 449, 453.

The plaintiff's evidence shows that she was traveling south on Kentucky avenue, in the city of Indianapolis, where the same crosses a great number of railroad tracks; that when she had gotten about half way across said tracks she saw a Vandalia train approaching from the west on the Vandalia track. She thereupon turned and started back north, and as she ran back she saw appellee's train coming from the east, and she testified that she thought she must get off these tracks, and that, she says, is the last she ever knew about it. Appellant's evidence is very meager and scarcely establishes that the appellee's train struck her at all. But even if we are justified in drawing the inference that she was struck and injured by appellee's train, yet there is nothing to show that the plaintiff was in the exercise of due care, or was free from contributory negligence. On the contrary, it pretty clearly appears that she ran in front of appellee's train while it was in rapid motion running west.

Appellant's learned counsel seek to avoid the effect of such apparent negligence by invoking the principle, that where one is put into a position of sudden peril by the negligence of another, causing the loss of presence of mind and confusion on the part of the injured person, such person is not chargeable with negligence, even though he do not take the best course to avoid the danger, and even though he may under such cir-

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cumstances act as no prudent person would act in the absence of fright and confusion caused by such sudden peril. While this is an old and familiar principle of the law of negligence, yet it finds no place in this case, because there is no proof that appellant was confronted by any such sudden peril. All she need to have done was to step between the tracks to secure safety. Indeed, she does not even claim in her testimony that she was frightened at the approach of the train either from the east or the west, much less that such fright or anything else caused her to lose her presence of mind whereby she did the rash act of running in front of the approaching train.

But, according to her own sworn statements, she knew all about the danger she incurred in so doing. She said she thought she could pass over the track in front of the train before it would reach her. She deliberately calculated, but made a mistake, and was injured. Under such circumstances her own deliberate act not only proximately contributed to her own unfortunate injury which appeals strongly to human sympathy, but it was almost the only cause contributing thereto, and without it her injury could not have occurred. Under such circumstances the stern demands of the law, as well as those of justice, require that she must endure her self-inflicted misfortune unremunerated.

The court did not err in directing such a verdict, and did not err in overruling her motion for a new trial. Judgment affirmed.

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 Cooper v. Shaw et al.
 

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## COOPER v. SHAW ET AL.

[No. 18,000. Filed September 21, 1897.]

**DRAINS.**—*Change of Line by Agreement.*—*Objections.*—When the line of a ditch, established by the board of commissioners under sections 5655-5688, Burns' R. S. 1894, is changed on the lands of any one or more persons by agreement of the county surveyor, those owning land on the line of said ditch above where the change was made cannot successfully ask for equitable relief, unless the change in some way interferes with the drainage of their lands. p. 315.

**SAME.**—*Construction.*—*Order of Sale of Allotments.*—*Objection.*—Under the provision of section 5673, Burns' R. S. 1894, of the drainage law, that any job not completed within the time fixed in the final report of the viewers, shall be sold for construction by the auditor, but that he shall not sell any allotment until the section immediately below shall have been completed, only those whose allotments were sold before the section below was completed have any right to object to such sale. p. 316.

From the Shelby Circuit Court. *Affirmed.*

*T. B. Adams, Isaac Carter, B. F. Love and H. C. Morrison,* for appellant.

*K. M. Hord and E. K. Adams,* for appellees.

**MONKS, J.**—It appears from the amended complaint that the board of commissioners of Shelby county established a tile ditch, under sections 5655-5688, Burns' R. S. 1894. Afterwards the county auditor under the provision of section 5673, Burns' R. S. 1894, sold for construction to Jesse Shaw, James Chester, and others that portion from station 104.54 to 113.58, and from 113.58 to 134.50, and entered into a proper contract therefor with said parties. That with the consent and agreement of appellee, Thomas S. Finley, who was then county surveyor, and appellee, Pruitt, who was his deputy, said appellee, Shaw, located and

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constructed said ditch from station 118 to station 134.50 on a line different from that established by the board of commissioners, at some points as far as fifteen rods from the established line. The distance from station 118 to station 134.50, on the line as established, was 1650 feet, no part of which was constructed by said Shaw; but he departed from the established line of said ditch at station 118, and did not return to said line until fifty feet south of said station 134.50. Under the agreement between the surveyor and said Shaw said ditch constructed between said points was to be treated the same as if it had been constructed upon the established line, according to the specifications of the report upon which the ditch was established; and when the same was completed on said new line, the said appellee, Finley, as surveyor, gave a certificate that said ditch had been completed between said points according to the specifications as provided in section 5675, Burns' R. S. 1894. Said William Pruitt was afterwards elected and qualified as surveyor of said county, and has entered upon the discharge of the duties of his office. After said certificate was issued said Shaw commenced work on the allotment sold to him for construction, above those for which said certificates were issued.

Appellant is the owner of real estate in section 17 on the line of said ditch, above the allotments bid off for construction by Shaw and others, and the share of said ditch allotted to his land is from station 38.50 to 45.15, which is above said allotments sold to said Shaw and others. None of the allotments sold to Shaw and others are charged to appellant's real estate.

Appellant brought this suit to cancel and set aside said certificate issued to Shaw and others, on the ground that said ditch was not constructed upon the

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established line, and to enjoin said Shaw from working on any allotment above station 118 until the ditch from said station 118 to 134.50 is completed on the established line.

Appellee's demurrer to the amended complaint was sustained, and appellant refusing to plead further, judgment was rendered against him on demurrer.

The only error assigned is that the court erred in sustaining the demurrer to the amended complaint.

The change in the line of said ditch, between stations 118 and 134.50, was not made upon appellant's land; nor is it alleged that the same, as constructed, will not furnish as good an outlet in every way for the drainage of his land and the water that will flow in said ditch through his land from the lands above as a ditch constructed according to the specifications upon the established line would have given. So far as appears from the amended complaint, the ditch when completed will drain appellant's land and the land above said change in the route, as well as if it had been constructed throughout upon the established line. When the line of a ditch, established by the board of commissioners under sections 5655-5688, Burns' R. S. 1894, is changed on the lands of any one or more persons by agreement of the county surveyor, those owning land on the line of said ditch above where the change was made cannot successfully ask for equitable relief, unless the change in some way interferes with the drainage of their lands. They are entitled to as good drainage in every respect as the ditch completed according to the specifications on the established line would give, and if they get that they can have no standing in a court of equity.

It appears from the proceedings before the board of commissioners, which are copied into the amended complaint, that the part of the ditch sold to appellee,

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Shaw and others, for construction, being from station 104.54 to 134.50, included allotments to several tracts of land owned by several different persons.

Appellant insists that the auditor had no authority to sell any allotment until the section immediately below it had been completed, and that any attempt to sell any allotment before the section had been completed is without authority of law, and is void.

Section 5673, Burns' R. S. 1894, provides that any job not completed within the time fixed in the final report of the viewers or reviewers shall be sold for construction by the auditor, but that he shall not sell any allotment until the section immediately below shall have been completed. If the auditor violated the provisions of said section in selling for construction to Shaw and others allotments, when the section immediately below each allotment sold was not completed, only those whose allotments were so sold have any right to object thereto. If the ditch is properly completed up to appellant's land, and the allotment charged thereto so as to give his land the drainage it is entitled to, it is of no interest to him whether they commenced at his land and constructed the ditch down to the mouth, or commenced at the lower end and constructed it up to his land.

It is a well settled rule in all cases under the drainage law that no person can bring any question before the court unless it affects his rights. If only the rights of others are affected he has no grounds of complaint. *Poundstone v. Baldwin*, 145 Ind. 139, 144, and cases cited; *Steele v. Epsom*, 142 Ind. 397, 406, and cases cited.

As appellant's amended complaint did not make a case entitling him to equitable relief, appellee's demurrer thereto was properly sustained.

Judgment affirmed.

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Wolf, Administratrix, v. The Big Creek Stone Company.

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WOLF, ADMINISTRATRIX, v. THE BIG CREEK STONE  
COMPANY.

[No. 18,144. Filed September 21, 1897.]

**APPEAL AND ERROR.**—*Answers to Interrogatories.*—*Overruling Motion for New Trial.*—*Harmless Error.*—Error cannot be predicated upon the action of the court in not requiring the jury to return more definite answers to three interrogatories where answers to other interrogatories were such as to prevent a recovery by the complaining party. *pp. 317, 318.*

**MASTER AND SERVANT.**—*Damages for Death of Servant.*—*Defective Appliances.*—*Knowledge of Danger.*—A recovery cannot be had for the death of a servant, caused by defective appliances furnished by the master, where it is shown that the servant had equal, if not better opportunities of knowing the condition of such appliances than the master. *pp. 318, 319.*

From the Monroe Circuit Court. *Affirmed.*

*John R. East, R. G. Miller, J. E. Henley and J. B. Wilson,* for appellant.

*H. C. Duncan and I. C. Batman,* for appellee.

HOWARD, J.—This was an action by appellant to recover damages for the death of her husband who, on August 23, 1890, was killed in the quarry of appellee by the falling of a derrick used to lift rock in the quarry. The jury returned a special verdict, being answers to interrogatories, upon which the court rendered judgment for the appellee.

It is contended that the judgment should have been for the appellant, and also that the court erred in overruling the motion for a new trial. The motion for a new trial was based upon an instruction directing the jury to return more definite answers to three interrogatories. Whether there was error in this we

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need not inquire, for the reason that even if the three answers were to be taken as originally returned, as appellant contends they ought to be, yet such answers, together with the remaining answers, over two hundred in number, would show such a state of facts as must preclude any recovery by appellant.

On the former appeal, *Big Creek Stone Co. v. Wolf*, 138 Ind. 496, the evidence was found to show that the deceased "had an equal, if not a better, opportunity of knowing the condition of the derrick" than the appellee. On this appeal the same state of facts is shown by the verdict of the jury.

From the verdict it appears, as said by Judge Coffey on the first appeal, that "the deceased, formerly owned the derrick, the breaking of which resulted in his death, using it in a quarry operated by himself. He sold it to the appellant \* \* \* and he assisted in putting it up."

The jury find that for four or five years he had been using the derrick in his own quarry, about three hundred yards distant from the quarry of appellee; and that but two days before the accident he had sold it to appellee, and assisted in erecting it in the place where it broke down. One of the braces of the derrick was set upon a ledge of rock, and the other was fastened to a stump. The deceased assisted in fastening them both, and knew of their condition before and after they were so fastened. At the time of the accident the employes were lifting a stone with the derrick, a smaller stone than the deceased had often lifted with the same derrick in his own quarry. While they were moving the stone he came out of the power house, where he was employed as engineer. He laid his hand on the stone, which at the time was suspended in the air, and he was pushing it when the brace fastened to the stump broke at or near the



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stump, and fell, striking and killing the deceased. He had observed some time before that this brace needed strengthening, and had then said that he would put a strip of iron upon it to make it stronger.

It is even more clear here than it was on the former appeal that, while the appellee was no doubt at fault in using an old and unsound derrick in lifting and moving stones too heavy for its capacity, yet the deceased, having built that derrick, and used it for years in his own quarry; having sold it to appellee, and assisted in setting it up in appellee's quarry; having also observed and proposed to repair the weakness at the very part that afterwards broke, and thus caused his death; having, moreover, at the time of the accident, turned aside from his proper duties as engineer, and assisted in pushing the stone that broke down the derrick, must be held to have had equal, if not better, opportunities of knowing the condition of the machinery that caused his death than the appellee, and so to have assumed all risks of danger to himself. See authorities cited on former appeal, *Big Creek Stone Co. v. Wolf*, *supra*.

Judgment affirmed.

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HILL ET AL. v. SWIHART ET AL.

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[No. 18,160. Filed September 21, 1897.]

**SPECIAL FINDINGS.—*Sufficiency Of.—Presumptions.***—Presumptions or intendments are not available to support a special finding, but the facts in issue must be stated with reasonable certainty. *p. 323.*

**SAME.—*Sufficiency Of.—Presumptions.—Liens.***—Where judgment creditors claim that the lien of their judgments are superior to the lien of a mortgage, and the special finding in the case does not disclose in what county or court such judgments were rendered, the Supreme Court will not presume on appeal that the judgments were rendered in the county in which the real estate is situated, and hold same to be liens on such real estate, under section 617, Burns' R. S. 1894 (608, R. S. 1881). *p. 323.*

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**EXECUTION SALES.**—*Sheriff's Certificate.*—A certificate of purchase, to lands sold at an execution sale, will not pass title to the real estate where no deed has been executed after the lapse of the year allowed for redemption. *pp. 323, 324.*

From the Fulton Circuit Court. *Affirmed.*

*Conner & Rowley and Enoch Myers, for appellants.*

*G. W. Holman and R. C. Stephenson, for appellees.*

JORDAN, J. —This action was instituted by Mary Swihart, one of the appellees, to foreclose a mortgage against certain real estate therein described, situated in Fulton county, Indiana. The note and mortgage in suit were executed by appellees, John A. and Granville M. Tatman. Appellants, Hill and Lewis, with others, were made parties defendant to the action as alleged judgment lien holders upon the real estate in controversy. Upon the issues joined between the several parties the court made a special finding of the facts, and stated its conclusion of law thereon. By the facts found it appears that the mortgaged premises were originally held and owned by one William Strand by a patent from the United States. In 1877 the land was conveyed by Jacob C. Spohn, who was then the owner thereof, to Peter Smith, the latter executing a mortgage thereon to Spohn to secure certain notes executed by him to Spohn. In April, 1881, one Robbins, who held this mortgage, commenced an action in the Fulton Circuit Court to foreclose the same, making John A., Granville, M., and Rebecca Tatman, and Mary Gringrich parties defendant, and they filed answers and cross-complaints in said action; and such proceedings were had therein that the court found that certain amounts of money were due to these parties respectively, and that the same were vendors' liens, and superior to the lien of the mortgage held by

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Robbins; and upon decreeing a foreclosure in favor of the latter, it was adjudged that his judgment lien was subject to the several liens held by the aforesaid defendants. In 1882, Smith conveyed by a quitclaim deed an undivided one-tenth of the land in question to Jacob S. Slick. The land having been sold for delinquent taxes, the auditor of Fulton county, on August 6, 1883, executed a tax deed to William M. Tatman. On August 20, 1886, Mary Gringrich, who does not appear to have had any interest or title to the lands in dispute, or claim thereto, save the lien declared in her favor in the action instituted by Robbins, conveyed the land by quitclaim deed to John A. and Granville M. Tatman. In September, 1891, Jacob Slick conveyed the undivided one-tenth of the land in question to William M. Tatman. In February, 1892, William R. Tatman, who does not appear to have had any title or interest in the land, conveyed it by quitclaim deed to John A. and Granville M. Tatman. On April 24, 1894, Earl Copeland recovered a judgment against John A. and Granville M. Tatman, which was afterwards assigned to the appellant, Hill. On September 26, 1894, William Levi recovered a judgment against the last mentioned Tatmans, which was assigned to appellant Lewis. On November 20, 1894, one Harding also recovered a judgment against John A. and Granville M. Tatman. Where, or in what court or county, these last mentioned judgments were recovered, the finding does not disclose. The judgment in favor of Robbins in the foreclosure suit remains unsatisfied. In April, 1895, the Tatmans, as stated in the findings, had their judgments "renewed" in a proper proceeding, and an order of sale decreed, and thereunder, on June 2, 1895, the land was sold at sheriff's sale to John A. and Granville M. Tatman, and a certificate of pur-

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chase issued to them, which on November 4, 1895, they sold and assigned to the appellees, Holman and Stephenson. The court also found facts upon which it adjudged that the appellee, Mary Swihart, was entitled to be subrogated to all the interest in the lands held by John A. and Granville M. Tatman, and that her mortgage lien was prior to the lien of the judgments held by the defendants. Upon the facts found, the court, in its third conclusion, declared that the sheriff's certificate held by Holman and Stephenson was a prior lien to the judgments held by the defendants Hill, Harding, and Lewis. These latter defendants excepted to this conclusion of the court, but Hill and Lewis are the only parties who appeal.

Their contention is that the lower court erred in its conclusion of law, in holding that the certificate of purchase of appellees, Holman and Stephenson, upon the sheriff's sale of the land under the judgment of the Tatmans recovered in 1881, was a superior or prior lien to the judgment rendered in 1894, against John A. and Granville M. Tatman, and held by these appellants by assignment from the judgment plaintiffs. They insist that the judgment upon which the certificate of purchase to the appellees, Holman and Stephenson, is based, by virtue of the sheriff's sale, was not a lien on the land in dispute at the time their judgments were rendered against John A. and Granville M. Tatman, for the reason that such lien, if any, under section 617, Burns' R. S. 1894 (608, R. S. 1881), had terminated after the expiration of ten years. Appellees, Holman and Stephenson, contend that under the special finding it does not appear that John A. and Granville M. Tatman at the time of the rendition of the judgments, under which the appellants claim to hold their liens, or at any time subsequent to that time, had any title or interest in the land in question, and hence

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that the judgments of appellants, for these reasons, can not be deemed or held to be liens upon the real estate in controversy, and therefore they are not harmed by the decision of the court, and are not in an attitude to question the conclusion of law. This contention of the appellees, we are of the opinion, must be sustained. The facts involving the issue for our determination are not stated, as is required in the special finding, with reasonable certainty. Much is left to presumptions or intendments. These are not available in favor of a special finding. *Cleveland, etc., R. W. Co. v. Moneyhun*, 146 Ind. 147.

Section 617, *supra*, among other things, provides that all final judgments of the supreme and circuit courts for the recovery of money or costs shall be a lien upon real estate and chattels real, liable to execution in the county where judgment is rendered, etc."

The special finding, as we heretofore said, does not disclose in what county or court the judgments held by the appellants were rendered, and we are left to infer that they were rendered in the circuit court of Fulton county, where the premises are situated, and in order to hold under the facts that the lien of these judgments at any time attached to the land in question, we would be compelled to indulge in presumptions or inferences in favor of appellants, upon whom the burden rests of showing facts in support of their insistence that their judgments were liens upon the real estate in dispute. This, under a well settled rule heretofore mentioned, we are not permitted to do. Again, no facts appear in the finding which disclose any title or interest in the lands held by the judgment debtors, at or subsequent to the rendition of appellants' judgments, to which the liens thereof could attach. The alleged right of the judgment debtors, John A. and Granville M. Tatman, in or to the real estate,

appears to have been founded upon the judgments recovered in 1881, and the certificate of purchase issued to them under the sheriff's sale thereon. This certificate did not operate to pass to them any title to the lands, in the absence of the execution of the sheriff's deed thereon, after the expiration of the year allowed by the statute for redemption. *Shirk v. Thomas*, 121 Ind. 147, 16 Am. St. 381, and authorities there cited; *Robertson v. Van Cleave*, 129 Ind. 217. Appellants having failed, for the reasons stated, to show by the finding of the court that their judgments were at any time liens upon the land in controversy, are not, in a legal sense, harmed by the action of the court in adjudging their alleged liens subordinate to the lien claimed by appellees, Holman and Stephenson, by virtue of the certificate of purchase, and, therefore, are not in a position to complain of the decision of the trial court.

Judgment affirmed.

#### THE STATE v. DOWNS.

[No. 18,219. Filed September 21, 1897.]

148	324
167	240

**CRIMINAL LAW.—Bribery.—Elections.—Indictment.—Sufficiency.**—An indictment for bribery under section 2329, Burns' R. S. 1894, need not charge that the elector would have voted differently without the bribe, as the gist of such offense is the giving or offering of an article of value to influence the vote of an elector. *p. 326.*

**SAME.—Bribery.—Elections.—Indictment.**—An indictment which charges the giving, or offering to give a thing of value to induce an elector to vote the Republican ticket is sufficient under section 2329, Burns' R. S. 1894, as there is no distinction between the voting of a ticket and the voting for a candidate. *p. 326.*

**SAME.—Bribery.—Elections.—Indictment.—Sufficiency.—Consideration Given Elector.**—An indictment, under section 2329, Burns' R. S. 1894, for bribing an elector, which charges the giving and offer to give "two dollars," sufficiently describes the consideration or influence put forth, as the value thereof does not determine the degree of punishment. *pp. 326, 327.*

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**JUDICIAL NOTICE.—Elections.**—This court judicially knows that at the last general election one of the great political parties of this State and nation, known as the "Republican party," submitted to the voters of this State, a ticket known by the people and recognized in the election laws as the "Republican ticket." *p. 328.*

**SAME.**—That which is judicially known need not be proven. *p. 328.*

From the Johnson Circuit Court. *Reversed.*

*Alonzo Blair, W. E. Deupree and M. L. Herbert,*  
for State.

*William A. Johnson,* for appellee.

**HACKNEY, J.**—The appellee was indicted in two counts, the first charging that he did, at, etc., on the 3d day of November, 1896, "feloniously hire one John King, at and for the hire and reward of two dollars, to vote the Republican ticket at the general election authorized by law for the election of State and county officers, and then and there being legally held at precinct number one, in the township of Blue river, in said county and State, the said John King being then and there a qualified voter of said precinct, and then and there entitled to cast his vote at said election." The second count, in the same manner, charged that the appellee feloniously offered to give John King two dollars to vote the Republican ticket at, etc. The lower court sustained the appellee's motion to quash each count, and that ruling is the only question presented by the record and briefs.

The statute under which the indictment was drawn provides that "Any person who shall give or offer to give, directly or indirectly, any money, property, or other thing of value, to any elector to influence his vote at any regular election held in this State pursuant to law, \* \* \* shall be guilty," etc. Section 2329, Burns' R. S. 1894.

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The objections urged by the appellee, some of which, it is said, influenced the lower court in its ruling, are, (1) that the words "two dollars," employed in either count, did not signify or raise the necessary inference that the consideration given or offered was money or a thing of value; (2) that it was not charged that King would have voted otherwise than as sought by the appellee; (3) that the designation "Republican ticket" was not sufficient without a charge that such a ticket was, at said election, before the voters for their suffrage, and (4) that the offense against which the statute is directed is that of giving or offering a thing of value to induce a vote for a "candidate" rather than for a "ticket."

The manifest object of the statute was to secure to the voter a free exercise of the right of suffrage, uninfluenced by any reward, or the offer thereof, and to deter others from giving or offering to give money or other thing of value to influence the voter in the exercise of such right. There is no word in the statute suggesting even that the corrupting gift or offer shall secure its object before the offense is complete. The gist of the offense is in the giving or offering of an article of value "to influence" the vote of an elector. Neither in the language, nor in the spirit of the statute is there such narrowness as to permit a distinction between the voting of a ticket and the voting for a candidate. In this State we vote for candidates by casting our ballots, which consist of the tickets of the various political parties. It is against the attempt to influence the vote of an elector that the law is directed, and it is not limited to an attempt in favor or against a particular candidate or set of candidates.

The charges of the giving and of the offering of "two dollars" sufficiently describe the consideration, or the influence put forth by the appellee. The offense may



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be complete in the giving or offering of money. The denomination or value of the money is of no consequence, and there is no reason for the allegation of value as in larceny, wherein value determines the grade of the offense, as petit or grand larceny, and directs the degree of punishment to be visited.

It is apparent, therefore, that if "two dollars" necessarily implies money, there is no valid objection to the indictment in omitting an allegation of value.

"Dollar is the money unit of the United States." 5 Am. & Eng. Ency. of Law, p. 854. Where a testator directed his executors to place the sum of "twenty thousand dollars" in some good investment, it was held that "there is no ambiguity about the word 'dollars.' If any word has a settled meaning at law, and in the courts, it is this. It can only mean the legal currency of the United States, not dollars vested in lands, or stocks." *Halsted v. Meeker's Executors*, 18 N. J. Eq., 136. "Money" in its strict technical sense, is coined metal, usually gold or silver, upon which the government stamp has been imposed to indicate its value. In its more popular sense, any currency, token, bank notes, or other circulating medium in general use as the representative of value. A generic term, and covers everything which by consent is made to represent property and passes as such currently from hand to hand. 15 Am. & Eng. Ency. of Law, p. 701. "Money" designates the whole volume of the medium of exchange regardless of its character or denomination. A "dollar" is of the volume of money, and is by law made a money unit of the value of one hundred cents. "Two dollars," therefore, could only mean a specific sum of money, or money, the value of which is fixed by law, and requires no proof. See *Burrows v. State*, 137 Ind. 474, 45 Am. St. 210; *McCarty v. State*, 127 Ind. 223; *Graves v. State*, 121 Ind. 357.

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An indictment charging, under section 2096, Burns' R. S. 1894 (2009, R. S. 1881), an attempt to corruptly influence a public officer, by offering him "\$50.00," was held good without adding that said fifty dollars were money and of value. *Shircliff v. State*, 96 Ind. 369. It is true that the objection that such additional allegation was omitted was not there made, but the fact that under a similar statute to that before us, and upon an indictment of the same character, both counsel and the court regarded no such objection as influential. See, also, Gillett's *Crim. Law* (2d ed.), p. 533, for the form of indictment for the offense in question, which form was employed in this case.

Nor do we deem it essential to the sufficiency of the indictment before us that it should have been charged that at said election there was a ticket known as the "Republican ticket" before the voters of the precinct for their suffrage. The court judicially knows that at the last general election one of the great political parties of the State and nation, known as the "Republican party," submitted to the voters of the various precincts of this State a ticket, known by the people, and recognized in the election laws of the State as the "Republican ticket." 12 Am. and Eng. Ency. of Law, p. 154; *State v. Swift*, 69 Ind. 505. That which is judicially known need not be proven.

We conclude, that the indictment is not bad in either count for any of the objections made against it. The judgment is reversed, with instructions to overrule the motion to quash the indictment.

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COOPER ET AL. v. RAY, AUDITOR.

[No. 18,001. Filed September 22, 1897.]

**DRAINAGE.**—*Sale of Allotment, for Construction, by Auditor.*—*Presumption.*—Where a county auditor, pursuant to section 5673,

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Burns' R. S. 1894, proceeds to sell, for construction, an allotment on a ditch established by the board of county commissioners, it will be presumed that such auditor has discharged his duty in every way under the drainage law. p. 331.

**SAME.**—*Sale of Allotment, for Construction, by Auditor.—Injunction.—Complaint.*—In an action to enjoin a county auditor from selling, for construction, an allotment on a ditch, on the ground that the section of the ditch immediately below has not been completed, the complaint must allege facts showing that such section has not been completed according to the specifications of the report upon which the ditch was established; an allegation that the sections of the ditch below the allotment "have not been constructed and completed as the law required they should be," is a mere conclusion. p. 331.

From the Shelby Circuit Court. *Affirmed.*

*T. B. Adams, Isaac Carter, B. F. Love and H. C. Morrison, for appellants.*

*K. M. Hord and E. K. Adams, for appellee.*

**MONKS, J.**—This suit was brought against appellee to enjoin him, as county auditor, from selling, for construction, an allotment on a ditch established by the board of commissioners of Shelby county. Appellee's demurrer, for want of facts, to the amended complaint was sustained, and appellants refusing to plead further, judgment was rendered on demurrer in favor of appellee.

The only error assigned calls in question the action of the court in sustaining the demurrer to the amended complaint.

The law under which said ditch was established by said board of commissioners, provides that there should be set apart to each parcel of land, and to each corporate road or railroad, and to the township where public highways are benefited, a share of said work in proportion to the benefits which will result to each, from such improvement, and the location of each share, its length in feet, and the estimated number of cubic

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yards of earth to be removed therefrom, and the cost per cubic yard, and the cost of construction of each share or allotment separately shall be given, and the manner in which the work shall be done, and the time within which each share or allotment should be constructed and completed shall also be specified. Sections 5656, 5670, Burns' R. S. 1894 (4286, 4300, R. S. 1881). And if any allotment shall not be completed within the time fixed, the same shall be sold by the county auditor to the lowest responsible bidder, and the auditor shall enter into a contract with the person to whom such allotment is sold. Section 5673, Burns' R. S. 1894 (4303, R. S. 1881).

It is the duty of the county surveyor, when notified by any landowner, that his allotment, or by any contractor that his job is completed, to inspect the same. and, if he finds that it is completed according to the specifications of the report on which the ditch was established, he accepts it and gives to the landowner, or in case the job has been sold, to the contractor, a certificate of acceptance, stating that said allotment or job is completed according to the specifications; and if an allotment has been sold to any person not the owner of the land assessed therefor, he shall in addition state the amount due the contractor, for constructing the same, from the owner of the land, which shall be a lien upon the land assessed for such share or allotment, and shall be due and payable immediately by the owner of the land. And when the county surveyor accepts it and issues his certificate of acceptance, he shall file with the county auditor a copy thereof, whereupon said auditor shall charge the amount mentioned in said certificate against the land assessed with such allotment, to be collected as other taxes are collected, together with six per cent. interest. Section 5675, Burns' R. S. 1894 (4305, R. S. 1881).

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It is admitted in the amended complaint that the allotment about to be sold by appellee has not been completed, but the excuse therefor is alleged as follows: "That the reason why said portion of said ditch has not been constructed is, that the sections of said ditch below said allotment, from there to the mouth of said ditch, have not been constructed and completed as the law required they should be, but that at one point of said ditch, commencing at section 118 and extending to section 134.50 on said ditch, has not been constructed at all, and that no work has been done on said ditch as located between said points; that the sections of the ditch immediately below the one offered for sale have only been partly constructed." The presumption is that the appellee as county auditor has discharged and is discharging his duty in every way under the drainage law, and such presumption can only be overcome by such facts as show the contrary. *Racer v. State*, 131 Ind. 393, 404, and cases cited. Every fact alleged in the amended complaint could be true and yet appellee be properly discharging the duties imposed upon him by said law. There is no allegation in the amended complaint that the section immediately below the allotment about to be sold has not been completed according to the specifications of the report upon which the ditch was established. The statement in the amended complaint that the sections of the ditch below the allotment which appellee is about to sell, and from there to the mouth of said ditch, "has not been constructed and completed as the law required they should be," is a mere conclusion, and not the allegation of a fact. *Indianapolis, etc., R. R. Co. v. Bishop*, 29 Ind. 202; *Jeffersonville, etc., R. R. Co. v. Underhill*, 40 Ind. 229; *Pittsburg, etc., R. W. Co. v. Keller*, 49 Ind. 211.

The act of March 4, 1863 (Acts 1863, p. 25), mak-

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ing railroad companies liable for stock killed without regard to the question of negligence, provides that "this act shall not apply to any railroad securely fenced in," etc. In actions brought under said act, the court held in the cases cited above that an allegation that defendant's road was not fenced in as required by law was a mere conclusion of law, and not the allegation of a fact. The allegation that "the sections of said ditch immediately below the one offered for sale has only been partly constructed," is not equivalent to an allegation of facts showing that the section immediately below the one about to be sold by the appellee has not been completed according to the specifications of the report upon which the ditch was established. The averment that no work has been done on the ditch from section 118 to section 134.50, "and that the same has not been constructed at all." standing alone, is of no force. It is not alleged that said part of the ditch is immediately below the allotment about to be sold, nor is there anything to show that any work was necessary on that part of the ditch. It may be located in the channel of a natural water course or old ditch, or across or along a depression in the ground, and no work be required to complete it in accordance with the specifications of the report upon which it was established. There are no facts alleged in the amended complaint showing that the section immediately below the allotment about to be sold by appellee has not been completed according to the specifications upon which this ditch was established. If such section was so completed appellee was required by the statute to sell said allotment. As against appellants and in favor of appellee, the presumption is that said section was so completed, and this presumption can only be overcome by the allegations of such facts as show the contrary. Such facts do not appear in the amended complaint.

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It is contended by appellee that the amended complaint is also insufficient because the acceptance by the county surveyor of the allotment below the one in controversy, and the certificate thereof, given by the county surveyor under the provisions of section 5695, Burns' R. S. 1894, is conclusive on appellants, and can not be called in question by them in this proceeding. As the amended complaint is insufficient for the reason already stated, we need not, and do not determine as to the correctness of the doctrine urged.

Judgment affirmed.

SMITH, TRUSTEE, ET AL. v. THE WELLS MANUFACTURING COMPANY ET AL.

[No. 17,912. Filed April 29, 1897. Rehearing denied Sept. 22, 1897.]

APPEAL.—*Same Question Presented by Demurrer to Answer and Special Finding.*—*Harmless Error.*—Error in overruling a demurrer to one of the defendant's answers, is harmless, where the special finding follows the facts alleged in another answer. *p. 335.*

CORPORATION.—*Authority of President When Acting as Agent.*—Where a mortgage of a corporation is being attacked by other creditors of the mortgagor as fraudulent, instructions by three of the five directors of such corporation to the president, authorizes him to release the mortgage, under an agreement with the other creditors that they will grant an extension of time to the mortgagor. *pp. 340, 341.*

APPEAL AND ERROR.—*Special Finding.*—A statement of an ultimate fact in a special finding will be disregarded on appeal, where the primary facts are also found and necessarily lead to a different conclusion. *p. 342.*

CORPORATIONS.—*Release of Mortgage.*—*Ratification by Trustee.*—A release of a mortgage to a corporation is ratified where a trustee of the corporation appointed by the stockholders, with full authority to close up its business, takes a new mortgage to secure the notes, and brings suit thereon. *pp. 342, 343.*

SAME.—*Directors Cannot Repudiate an Act of the Stockholders.*—The board of directors of a private corporation possess no authority to repudiate any act done by the authority of the stockholders. *p. 343.*

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148	113
150	136
150	442
151	399
151	508
152	668
148	338
152	563
148	333
154	185
148	333
153	204
148	333
159	620
148	333
168	665

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**MORTGAGE.**—*When a Creditor Cannot Object Because Executed in Fraud of Creditors.*—A creditor cannot object to a mortgage of his debtor on the ground that it was executed and received in fraud of creditors, where it was given in pursuance of an agreement between himself and the mortgagee. *p. 344.*

**SAME.**—*Preference by Insolvent Corporation.*—A corporation in failing circumstances, and with assets less than its liabilities, may, like an individual, prefer creditors by executing mortgage or other liens upon its property. *p. 345.*

**CORPORATIONS.**—*Contract.*—*Fraud.*—The mere fact that a contract is made between two corporations having common directors does not render the contract fraudulent or void. *p. 345.*

From the Hancock Circuit Court. *Affirmed in part and reversed in part.*

*R. A. Black, J. N. Doty, J. B. Black, E. B. Pugh, O. B. Jameson, R. O. Hawkins and H. E. Smith, for appellants.*

*M. Marsh and W. W. Cook, for appellees.*

HACKNEY, J.—In the year 1892, the Wells Manufacturing Company, a corporation of Indiana, was indebted to numerous mercantile creditors in the sum of \$17,000.00, and to the Findlay Window Glass Company in the sum of \$9,000.00, and, to secure said indebtedness, executed, on the 8th day of March, 1892, a mortgage on its plant and certain of its other personal property to said Findlay Company, and on the 13th day of June, 1892, executed a mortgage to Smith, as trustee for said mercantile creditors, upon said plant. The proceedings herein were upon the consolidation of two suits by said mortgagees, respectively, to foreclose said mortgages, and the questions here presented arise upon a special finding of facts, with conclusions of law thereon.

A question has been discussed as to the ruling of the lower court in overruling a demurrer to the second answer of the Findlay Company to the complaint of said



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trustee, said answer alleging that the trustee's mortgage was invalid because executed in preference of creditors when the Wells Company was insolvent. The special finding follows the facts alleged in the third answer of the Findlay Company, and the ruling upon said demurrer, if erroneous, was harmless, since a correct statement of the law may be made upon the facts pleaded in the second answer as they are found in the special finding. *Woodward v. Mitchell*, 140 Ind. 406; *Scanlin v. Stewart*, 138 Ind. 574; *Ross v. Banta*, 140 Ind. 120; *Walling v. Burgess*, 122 Ind. 299; *State, ex rel., v. Vogel*, 117 Ind. 188. This conclusion is conceded, substantially, by the learned counsel for the trustee.

The facts found specially were, that the Wells Company, on the 8th day of March, 1892, was indebted to the Findlay Company upon notes, the amount of which, at the date of the judgment, was \$12,349.50; that at the same time said company was indebted to Black & Gordon in the sum of \$2,668.18, to certain mercantile creditors, represented by Smith, trustee, in the sum of \$17,000.00, the balance whereof, at the time of the judgment, was \$11,581.07, and to others; its aggregate indebtedness being \$39,000.00, the larger portion of which was overdue and wholly unsecured, except the sum of \$3,400.00, secured by a pledge of manufactured goods. At that time the assets of the Wells Company consisted of personal property, stock in trade, notes and accounts of the value of \$20,300.00, and its real estate and plant, of the value to it of \$15,000.00, but, for the purposes of sale, of an uncertain value, and said company was insolvent and had then abandoned any hope, prospect or expectation of continuing business as a going concern. At and after that time James A. Wells and wife, and Ulysses G. Baker and wife, severally owned and held a large

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proportion of the capital stock in both said Findlay Company and said Wells Company, and said James A. Wells and Ulysses G. Baker were directors in each of said companies, the said Wells being the president, and said Baker secretary of said Findlay Company. On said 8th day of March, 1892, the said Wells Company executed a mortgage on all its real and personal property, including its plant, to secure its then existing indebtedness to said Findlay Company and said Black & Gordon, the said Wells then well knowing the condition of said Wells Company, and both said Wells and said Wells Company intending and expecting that said Wells Company should cease and discontinue its business. "Said mortgage, however, was not executed or accepted with any fraudulent intent to use the same as a means or instrument of forcing or compelling a composition settlement with other creditors of said" Wells Company, "or of forcing or compelling the granting by them of extension of time of payment of indebtedness unto them." On the 12th day of March, 1892, said Findlay Company commenced suit to foreclose said mortgage, and for the appointment of a receiver to wind up the affairs of said Wells Company, and on said day the court appointed one Cooper such receiver, and he thereupon qualified, gave bond and entered upon the duties thereof. Very soon thereafter said mercantile creditors employed counsel to represent them in proceedings to attack the validity of said mortgage to the Findlay Company and to protect their interests as creditors of said Wells Company, and they were about to institute suit for that purpose, when, on the 4th day of June, 1892, an agreement was reached between said mercantile creditors, said Wells Company, and James A. Wells, acting as president of said Findlay Company, but without special authority in that behalf, whereby said mort-

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gage to the Findlay Company was released by said Wells, so acting as president, and so without special authority in that behalf; said receiver paid the debt so owing to Black & Gordon, turned back to the Wells Company its property and was discharged; said mercantile creditors extended the time for the payment of their claims, taking each six notes, the notes representing respectively 15, 10, 15, 10, 25, and 25 per centum of the several claims; said Findlay Company was to receive no security for its claim until fifteen per centum of said mercantile claims had been paid, and said mercantile creditors, in the name of the appellant, Smith, as trustee, were secured in their said claims by a mortgage of the real estate and plant of said Wells Company. The several elements of said agreement were completed on June 13, 1892, and the Wells Company resumed its ordinary and regular business, there having then occurred no substantial change in the financial condition of said Wells Company since March 8, 1892, as aforesaid, and said Wells Company then in good faith believed that it would be able to continue its corporate enterprise as a going concern, and did continue thereafter so to do for a period of seventeen months. In the execution of said agreement, and of the mortgage of June 13, 1892, said Wells Company and said trustee intended to "thereby hinder and delay the said Findlay Window Glass Company in the collection of its said debt against the Wells Manufacturing Company for an indefinite period."

Upon the questions as to the authority of Wells to release said mortgage to the Findlay Company, and of the ratification by said company of his action in releasing the same, it was found, in addition to the abstract finding, that he had no such authority, that

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when the suit of the mercantile creditors, attacking said mortgage was threatened, said Wells, Baker, and Tappan, three of the five directors of the Findlay Company, consulted about the matter, and Wells was directed to go to Greenfield "and do the best he could" about arranging the matter on behalf of the Findlay Company. While he had never before released a mortgage, he had, with the knowledge of the company, habitually, and in the regular course of business and without action of the board of directors, bought and sold goods, executed, endorsed, and transferred promissory notes, and made contracts for and in the name of said company, and had been actively engaged in the management of its business. During all of said time two of the five directors, other than those above named, were mechanics, working in the factory and taking no active part in the business management. It was found also that when Wells went to Greenfield and took the mortgage in favor of the Findlay Company, he did so upon the same general direction, after consulting with Tappan and Baker, that he should go and do the best he could in arranging the indebtedness to said company. In June, 1893, by action of the stockholders, the Findlay Company "determined to go into voluntary liquidation and cease business, and appointed and elected Samuel J. Tappan (a director and vice-president of the company) as trustee, with authority to do all things necessary to that end."

In July, 1893, Wells surrendered the notes, to secure which, said released mortgage had been executed to the Wells Company, and took from it, in lieu thereof, several notes in amounts proportioned to the stock holdings of the stockholders of the Findlay Company, his object being to distribute said notes to the Findlay company stockholders in such proportions as they so held stock therein. Immediately thereafter said

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Tappan distributed to the stockholders of said company about nine thousand dollars of the notes so taken, endorsing the same in the name of said company.

In November, 1893, Tappan, being president of said Findlay Company, and acting as such trustee, then knowing all of the facts as to the release of said mortgage by Wells, and the execution of said other mortgage to Smith, trustee, and the agreement with reference thereto, took from said Wells Company a single promissory note for \$11,190.66, payable to said Findlay Company, in lieu of said notes so last taken by Wells for distribution to the said stockholders, he having first procured them from said stockholders. At the same time said Tappan took from said Wells Company a mortgage of the property so theretofore mortgaged to said Smith, trustee, to secure said note of \$11,190.66. Two days later Tappan had suit brought to enforce foreclosure for said sum and to appoint a receiver of said property. On the same day, in said suit, one Snow was appointed receiver for the Wells Company and took possession of its property. On December 28, 1893, the board of directors of the Findlay Company, by resolution, repudiated, as unauthorized, and as not the act of said company, and as not having been ratified or approved by it, the release of said mortgage by said Wells, and the action of Tappan, of November 6, 1893, in accepting said note of \$11,190.66 and the mortgage securing the same, and directed the surrender of said note to the Wells Company and a demand for the notes described in the mortgage of March 8, 1892, upon which latter notes and the mortgage first mentioned, it was further ordered that suit should be instituted. After demand, etc., and on January 11, 1894, the suit herein consolidated was brought by the Findlay Company upon the notes so surrendered and the mortgage so released, the suit

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upon said \$11,190.66 note and mortgage then having been dismissed. It was found also that some four months after releasing said mortgage of March 8, 1892, said Wells reported to Tappan and Baker, directors, that he had done so, and that after fifteen per centum of the mortgage to Smith, trustee, was paid and in November, 1892, the Wells Company would pay \$5,000.00 to the Findlay Company. By the terms of the notes and mortgage executed to Smith, trustee, they were past due when, on January 12, 1894, the suit, by said trustee, herein consolidated, was instituted and therein said Snow was appointed receiver for the Wells Company, and was ordered to continue in the possession of its property, and has since sold the mortgaged property, freed of liens, for \$4,455.01.

The court rendered conclusions of law that both of the mortgages in suit were void.

The appellees are not represented in this court, and there is no question made in their behalf, but the questions presented and discussed relate to the validity and priority of the mortgages of the appellants respectively.

As to the power of Wells, president, to release the mortgage, of March 8, 1892, to the Findlay Company, it will be observed that it is found generally that he had no such authority, while it is found also that, at a time when suit was pending to foreclose the mortgage and within a few days after its execution, the mercantile creditors had employed attorneys and were threatening to attack the mortgage as fraudulent. At that time it had not been definitely settled in this State whether an insolvent corporation could legally prefer a creditor, nor as to whether one, an officer in two corporations, might act in extending a preference by one of such corporations to the other. In this situation three of the five directors of the Findlay Company,

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those having charge of the company's business affairs, instructed Wells, the president, to do the best he could in the matter. It is argued for the Findlay Company that this instruction did not include authority to release the mortgage, since that was a sacrifice of the rights of the company.

There is certainly little reason to claim that, under this comprehensive authority, Wells could not do any act which the board of directors might have done. Nor can it be seriously questioned that the board of directors would not be presumed to possess authority to decide whether the company should stand upon the mortgage, engage in extended and expensive litigation to maintain its validity upon questions of doubt and uncertainty, or should release the mortgage, when to do so would secure to the mortgagor, by an extension of time upon the mercantile debts, and a division of payments into small sums at favorable intervals and thus enable it, the mortgagor, to more easily remove \$17,000.00 of its indebtedness, and thereby place the Findlay Company in a better position for the collection of its debt than it would be without a mortgage. Of course, with the validity of the mortgage conceded, its release was not, for the Findlay Company, a wise step if it had been taken by the board of directors, but it was not less wise because taken by the president. But without the concession of the validity of the mortgage the step would not appear so unwise. However, the question of authority did not depend upon the wisdom of the decision, but it rested upon the right to make a decision. As we have said, there can be no doubt of the right of the board to decide and, in our opinion, the instruction to Wells to do the best he could gave him the authority to decide as to what course was best.

The question of the effect of the court's general

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statement that Wells had no authority to release the mortgage has been discussed. As to whether that statement was a conclusion of law, or the statement of the ultimate fact, and whether it precludes further inquiry by this court have been discussed. We have no doubt that the statement was intended as of the ultimate fact, but where the primary facts are stated and they lead to but one conclusion, the statement of the ultimate fact will be disregarded, since a statement of the ultimate fact is required only where, from the primary facts, either of two conclusions may reasonably be drawn. *Cincinnati, etc., R. W. Co. v. Gramcs*, 136 Ind. 39; *Smith v. Wabash R. R. Co.*, 141 Ind. 92; *Board, etc., v. Bonebrake*, 146 Ind. 311.

The primary facts found reasonably support but one inference of fact, the presence of authority from the board to employ his own judgment in meeting and averting the threatened law suit. So far as the conclusion that no authority existed may have involved a question of law, if it did involve such question, the conclusion would in like manner be rejected.

Whether the act of Wells in releasing the mortgage had been ratified by the Findlay Company is a question which has been discussed, and, while the holding that authority existed to release it may seem to render a decision upon the question of ratification unnecessary, if we should be in error as to the existence of such authority, a conclusion against said company as to the ratification would support the judgment of the trial court against it. Leaving out of view the conduct of the board, and of Wells prior to June, 1893, when the stockholders turned the affairs of the Findlay Company over to Tappan, the facts disclosed that Tappan, to whom the stockholders gave authority to do all things necessary in liquidating and closing up the business of the company, knew of the prior mort-



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gage, and of the facts attending its release, knew that the original notes had been renewed, and many, if not all of the stockholders knew this, for they received, severally, the renewal notes to their individual credit; he took up the renewal notes distributed to the stockholders, procured a new note in lieu thereof, procured a mortgage to secure the same, and brought suit on that note and mortgage.

The stockholders had given Tappan as full authority, with reference to the closing of the company's business, and the securing, collecting, and disbursing its assets, as the board of directors could have possessed. The authority was sweeping and comprehensive. Subsequently, it is found, that by resolution, the board of directors repudiated all that he did. The court does not find as a primary or as an ultimate fact that Tappan did not ratify the action of Wells in releasing the mortgage, nor is it found, as a question of fact, that the action of the board had the effect to recall and obviate all that he did. As a question of law the board of directors possessed no authority to repudiate any act done by the authority of the stockholders. With the knowledge and authority possessed by Tappan his acts, as stated, were a complete confirmation or ratification of the release of said mortgage. It has been insisted that the silence of the finding as to a ratification of the release must be held as a finding against the Findlay Company on that question. We do not decide the question, but there are authorities to the point that where a corporation asserts that an act of its officer is not binding upon it, the burden rests upon it to establish not only the absence of authority in the officer to do the act but that it has not ratified the act done. *National State Bank v. Vigo County National Bank*, 141 Ind. 352; *Patterson v. Robinson*, 116 N. Y. 193, 22 N. E. 372; *Oakes v. Cat-*

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*tarraugus, etc., Co.*, 143 N. Y. 430, 26 L. R. A. 544, 38 N. E. 461; Thompson, Corp., vol. 5, section 5967; Clark on Corp., p. 155; Taylor on Private Corporations, section 238, note 1, p. 201; *Chemical, etc., Bank v. Kohner*, 85 N. Y. 189.

The validity of the mortgage of the appellant Smith, trustee, is denied on behalf of the Findlay Company upon the grounds that it was executed and received in fraud of creditors; first, because it was intended to hinder and delay the Findlay Company in the collection of its claim against the Wells Company, and second, because executed by an insolvent corporation. The first of these objections to the validity of that mortgage loses all of its force when it is considered that the Findlay Company is bound by the agreement and mortgage which extended the time of the payment of the mercantile claims, and gave the mortgage to Smith, trustee, precedence, and thereby hindered said company. Not taking into consideration the question as to whether the language of section 6645, Burns' R. S. 1894 (4920, R. S. 1881), "All conveyances \* \* \* made \* \* \* with intent to hinder" or "delay \* \* \* creditors \* \* \* shall be void," means with a fraudulent intent so to hinder, it is evident that it was not the purpose of that provision to deny the right of persons to contract for delay and to be bound by their own stipulations which delay or hinder them in the collection of their credits. But the language of the statute is more explicit, for it provides that any such conveyance, etc., "shall be void as to the persons sought to be defrauded," not that they shall be void generally. Another provision of the statute, section 6649, Burns' R. S. 1894 (4924, R. S. 1881), is, that "the question of fraudulent intent, in all cases arising under the provisions of this act, shall be deemed a question of fact," and many decisions of this

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court so hold. In this case it is not found as a question of fact that the mortgage of the trustee was executed with a fraudulent intent.

The second objection to the validity of that mortgage is not tenable since our court adheres to the doctrine that a corporation in failing circumstances and with assets less than its liabilities may, like an individual or a copartnership, prefer creditors by executing mortgage or other liens upon its property. *Levering v. Bimel*, 146 Ind. 545; *Henderson v. Indiana Trust Co.*, 143 Ind. 561; *First Nat'l Bank v. Dovetail, etc., Co.*, 143 Ind. 550; *First Nat'l Bank v. Dovetail, etc., Co.*, 143 Ind. 534.

It is held also that the mere fact that a contract is made between two corporations having common directors does not render such contract fraudulent or void. *Evansville, etc., Co. v. Bank of Commerce*, 144 Ind. 34.

Upon a fair construction of the special findings it does not appear, as counsel for the Findlay Company seem to imply, that the Wells Company was under receivership at the time the mortgage to the trustee of the mercantile creditors was executed. The agreement, preceding the mortgage, comprehended the discharge of the receiver and the return of the property to the company, and that was done. The property covered by the mortgage did not, therefore, continue, if it became so by the receivership, a part of the trust fund or estate for the benefit of the Findlay Company as a creditor. By the terms of the agreement the Findlay Company stipulated for the release of the property from the receivership, and it cannot, therefore, claim that the property was held for its benefit.

We conclude that the court erred in its conclusions of law with reference to the invalidity of the mortgage to the appellant, Smith, trustee, and as to him

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the judgment is reversed with instructions to restate the conclusions of law in accordance with this opinion. As to the appellant, the Findlay Window Glass Company, the judgment is affirmed.

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[No. 18,815. Filed September 28, 1897.]

148	346
132	8
148	346
156	107
148	346
180	888
148	346
161	232
161	489
148	346
171	666

**STATUTES.—Amendments.—Title of Act.—Public Offense Act.—Having in Possession Gill Net, or Seine.**—The title of the public offense statute of 1881 (Acts 1881, p. 174) is sufficiently broad and comprehensive to include the offense of having in possession a gill net, or seine, as defined in the amendatory act of 1889 (Acts 1889, p. 102). *p. 348.*

**SAME.—Title of Act.—Construction.**—The degree of particularity with which the title of an act shall express the subject thereof is not defined by the constitution, but rests with the legislature, and courts will not condemn an act of the legislature for the reason alone that the subject thereof is not fully expressed in the title. *p. 348.*

**SAME.—Public Offense Act.—Having in Possession Gill Net, or Seine.**—Section 2 of the act of 1889 (Acts 1889, p. 102), making it a misdemeanor for any person to have in his possession any gill net, or seine, is but a continuation of section 209 of the public offense act of 1881 as by the act of 1889 amended, and the mere fact that it is divided into two sections instead of one does not result in rendering any part of the act invalid. *p. 349.*

**SAME.—Amendments.—Title.**—An amendatory statute is not to be regarded independently of the one which it amends, but may be so framed as to serve to amend certain parts and add such supplementary sections as are embraced in and connected with the subject expressed in the title of the original act. *p. 349.*

**SAME.—Manner of Enactment.**—A statute bearing the attestation of the presiding officers of the respective houses of the legislature imports absolute verity, and is conclusive evidence that the statute was in all things duly passed in conformity with the requirements of the constitution. *p. 350.*

From the Lake Circuit Court. *Affirmed.*

Willis C. McMahan, for appellant.

W. A. Ketcham, Attorney-General, and Merrill Moores, for State.

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JORDAN, J.—Appellant was convicted of the offense of having in his possession a certain gill net, or seine, in violation of the provisions of the amendatory statute approved March 5, 1889, section 2229, Burns' R. S. 1894 (Acts 1889, p. 102). Motions to quash the information, and in arrest of judgment were each overruled, and the rulings of the court thereon are assigned as errors.

Counsel for appellant urges no objections to the form of the information, but assails the constitutional validity of the law upon which it is based, substantially upon the grounds that it violates the following provisions of the constitution.

*First*—Article 4, section 19, which requires that "every act shall embrace but one subject and matters properly connected therewith; which subject shall be expressed in the title."

*Second*—Article 4, section 21, by seeking to amend the act of 1881 defining public offenses by a mere reference to its title.

*Third*—Article 4, section 18, that the bill for the act in question does not appear to have been read on three several days and then passed by a yea and nay vote, as required by this section of the constitution. The statute in controversy amended section 209 of the public offense act, approved April 14, 1881 (Acts 1881, p. 174). This latter act was entitled: "An act concerning public offenses and their punishment," and section 209, prior to its amendment, imposed a fine upon any person who, during the months of March, April, May, November, or December of each year, should take, with a gig or spear, fish from the waters therein mentioned, or who should be guilty of taking fish therefrom with a net, seine, gun, or trap, of any kind, or set net, weir, or pot in such waters, and also made it a penal offense for any person to keep a net or seine to let, or to loan,

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or let the same, for the purpose of fishing in the lakes or streams of this state in violation of the provisions of the act. The amendatory act of 1889, *supra*, was entitled, "An act to amend section 209 of an act entitled, 'An act concerning public offenses and their punishment,' approved April 14, 1881, the same being section 2117, R. S. 1881, and declaring an emergency." The amendment materially changes and enlarges the penal provisions of section 209 as originally enacted, and then proceeds, by what is numbered section 2, to declare it to be a misdemeanor for any person to have in his possession any gill net or seine, etc., and prescribes the punishment to be assessed in the event of a conviction; and this provision seems to be the one upon which this prosecution rests. That the title of the public offense statute of 1881 is sufficiently broad and comprehensive to embrace or include the offense of which appellant was convicted as defined by the amendatory act, in view of former decisions of this court, cannot be successfully questioned. See *Bitters v. Board, etc.*, 81 Ind. 125; *Elder v. State*, 96 Ind. 162; *Hedderich v. State*, 101 Ind. 564, 51 Am. Rep. 768; *Barnett v. Harshbarger*, 105 Ind. 410; *Benson v. Christian*, 129 Ind. 535.

The degree of particularity with which the title of an act is to express the subject thereof, is not defined by the constitution, and rests with the legislature. Courts, in this respect, are inclined to entertain and adhere to a liberal rule, and will not condemn an act of the legislature for the reason alone that the subject thereof is not as fully expressed as it otherwise might have been. *Shoemaker v. Smith*, 37 Ind. 122. Appellant's learned counsel, however, insists that section 2 of the act of 1889, does not purport to amend section 209 of the law of 1881, but creates a new offense and provides for its punishment, and that the purpose of

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the former act should have been expressed in its title. It must be conceded that the statute is a specimen of awkward and bungling legislation, which seems to have resulted in dividing section 209 into two paragraphs. It is apparent that the provisions of section 2 could have been properly embodied in section 209, and, in effect, they are but a continuation of the latter section as amended, and may be so treated and considered. Section 2 declares that other acts, not originally mentioned in section 209, shall constitute a misdemeanor. It is evident that these provisions are germane to, properly connected with, and embraced in the subject expressed in the title of the act of 1881. Where the title of an original act is sufficiently broad to include the provisions embraced in an amendatory one, it is not essential that the title of the latter, in this respect, be of itself sufficient. *Brandon v. State*, 16 Ind. 197; *Shoemaker v. Smith*, *supra*.

Strictly speaking, an amendatory statute is not to be regarded independently of the one which it amends. It may be so framed as to serve to amend certain parts and add such supplementary sections as are embraced in, and connected with the subject expressed in the title of the original act. *Shoemaker v. Smith*, *supra*; *Blakemore v. Dolan*, 50 Ind. 194.

The title of the act of 1889 referred to the section, and indicated the act to be amended, and in the enacting part thereof it was declared, "that section 209 of the above entitled act be amended to read as follows." Then follows, at full length, the provisions ingrafted into the statute by the amendment. The title of the amendatory act was sufficient, and the mere fact that its provisions are divided into two paragraphs or sections, instead of being confined to one, does not result in rendering any part of the act invalid. *Underwood v. McDuffee*, 15 Mich. 367, 93 Am. Dec. 194; *Swart*.

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*wout v. Michigan, etc., R. R. Co.*, 24 Mich. 399; *Reed v. State*, 12 Ind. 641.

In the case last cited, this court in sustaining the validity of an amendatory act, over objections similar to those urged against the act involved in this appeal, said: "It is again objected that the division of the amendatory act into two paragraphs or sections, is evidence that two subject-matters are included in it; that as the title professes to amend but one section of the old law, that amendment must be contained, and be presumed to be so contained, in the section of the amendatory enactment within which the old law to be amended is set forth.

"Upon the question of numbering and paragraphing, the authority last referred to is as follows: 'The numbers prefixed to the several sections, paragraphs, or resolutions, which constitute a proposition, are merely marginal indications, and no part of the text of the proposition itself; and, if necessary, they may be altered or regulated by the clerk, without any vote or order of the House.'"

Whether the bill for the act in dispute was read in the General Assembly, and enacted into a law in the manner required by the constitution, we need not inquire. The law comes to us bearing the attestation of the presiding officers of the respective houses of the legislature, and that this imports absolute verity, and is conclusive evidence that the statute was, in all things, duly passed in conformity with the requirements of the constitution, is a question now firmly settled by our decisions. *Evans v. Browne*, 30 Ind. 514, 95 Am. Dec. 710; *Western Union Tel. Co. v. Taggart, Aud.*, 141 Ind. 281, and cases there cited. The validity of this statute as a proper police regulation was affirmed in the case of *State v. Lewis*, 134 Ind. 250.

It follows, for the reasons stated, that the objec-



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tions urged by appellant are not tenable, and the validity of the law is sustained and the judgment affirmed.

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[No. 17,701. Filed Jan. 5, 1897. Rehearing denied Sept. 23, 1897.]

**APPEAL AND ERROR.—Cross-Errors.—Special Findings.—Exception.**

—Cross-errors assigned to a conclusion of law in a special finding cannot be considered on appeal where no exception was taken to such conclusion of law. *pp. 352, 353.*

**FRAUDULENT CONVEYANCES.—Husband and Wife.—Tenants by Entireties.**

—A conveyance of real estate by a husband and wife to a third person to be by him conveyed to such husband and his wife as tenants by entireties, is fraudulent and void as to the creditors of the husband if made without consideration, or if made for the purpose of hindering, cheating and delaying such creditors. *p. 355.*

**ADVANCEMENTS.—Father to Daughter.—Husband and Wife.—Advancement Applied to Purchase Money of Real Estate.—When No Trust Created in Favor of Wife.**

—A father may make advancements to his daughter by deeding land to her husband, and such disposition of the advancement will not make the husband a trustee for his wife, unless the trust is expressly declared or may be implied from the circumstances of the case, or unless there is a constructive trust by reason of fraud on the part of the husband in taking the deed in his own name. *p. 356.*

**HUSBAND AND WIFE.—Advancements.—Equity of Wife in Real Estate Purchased by.**

—Equity will not enforce a lien in favor of the wife at the death of her husband to a one-half interest in real estate held by the husband, as against creditors, on account of money furnished by the wife's father as an advancement to her, and used in payment of one-half of the purchase-price of such real estate, where the deed to the real estate was made to the husband with the consent of the wife's father who made the advancement and paid same to the grantor after the deed was so made. *pp. 355, 356.*

**APPEAL AND ERROR.—Theory.—Change of on Appeal.**

—A party cannot seek relief by one theory in the pleadings and evidence introduced in the trial court, and then ask to have relief given on another theory on appeal. *p. 357.*

**HUSBAND AND WIFE.—Advancements.—Equitable Lien of Wife on Real Estate of Husband.—Enforcement.**

—Equity will not enforce a lien in favor of the wife on real estate of the husband while she holds real estate conveyed to her by the husband in lieu of such lien, although not accepted by her as such. *p. 357.*

148	351
149	449
150	301

148	351
169	644

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From the Noble Circuit Court. *Reversed.*

*L. W. Welker and W. L. Taylor, for appellants.*

*H. G. Zimmerman, H. C. Peterson, R. W. McBride  
and C. S. Denny, for appellees.*

HOWARD, J.—The appellee, Comfort E. Stanley, is the widow and also the administratrix of the estate of Henry L. Stanley, deceased. This action was brought by the appellants, as claimants against the estate of said decedent, to set aside as fraudulent two deeds, one given by Henry L. Stanley and wife to the appellee, Abe Ackerman, and one from said Ackerman to Henry L. Stanley and Comfort E. Stanley, as husband and wife, and to subject the land so conveyed to the payment of said claims. Comfort E. Stanley answered the complaint by general denial, and also by a special plea to which a demurrer was sustained. She also filed a cross-complaint asserting her ownership of said land in fee simple, and asking to have her title quieted. The facts were found specially by the court, with conclusions of law; (1) that the deeds in question should be set aside as fraudulent against creditors; (2) that Comfort E. Stanley was the equitable owner of the undivided one-half of said land, and (3) that the remaining undivided one-half of the land should be sold in payment of the debts of said estate, subject to the right of the widow to the one-third thereof. The appellants contend that the court erred in its second and third conclusions of law, and also in overruling the motion for a new trial. The appellees assign cross-error as to the first conclusion of law, and also as to the action of the court in sustaining the demurrer to the special answer. The cross-errors, however, cannot be considered. Appellees took no exception to the first conclusion of law, and they have not discussed in their

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brief the alleged error of the court in sustaining the demurrer to the special paragraph of answer. Moreover, we do not think there was any error in the rulings complained of. See, as to the affirmative answer, *Crow v. Carver*, 133 Ind. 260.

The facts as found by the court show: (1) That on August 26, 1884, the land in question was conveyed to Henry L. Stanley by his father for \$4,000.00, of which sum \$2,000.00 was treated as an advancement by the father of said Henry L., and the remaining \$2,000.00 paid by the father of Comfort E., as an advancement to her husband and herself. She and her husband soon after joined in a receipt showing that her father had advanced her said sum of \$2,000.00; (2) that the deed for the land was written, signed, and acknowledged in the absence of Henry L. and his wife, and afterwards, on the same day, Henry L. Stanley, together with his father and his wife's father, went to the office of the justice who had written the deed, and where the same was ready for delivery, at which time and place the deed was delivered to Henry L. by his father, his wife's father also then and there paying to Henry L.'s father said \$2,000.00, the one-half of the purchase price of said land, for and on behalf of his said daughter; (3) that the conveyance so made was executed to and in the name of Henry L. Stanley alone, without the knowledge or consent of his said wife; (4) that the deed so made was accepted by said Henry L. Stanley, and duly recorded; (5) that on December 12, 1887, Henry L. Stanley purchased two lots in the town of Albion for \$1,100.00, and placed the title thereto in the name of his wife, for the purpose of paying her the amount her father had put in the real estate in question, and thereafter he made improvements on said lots until he considered that he had

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made good to her the amount her father had advanced to them; that he owed no debts at the time when the title to said lots was so vested in his wife; but there is no evidence that she accepted or agreed to accept, and she did not accept the title to said lots in lieu of or in satisfaction of any right, title, or interest she had in the lands in question; (6) that on April 16, 1889, Henry L. Stanley purchased a second tract of land, paying part cash and assuming a mortgage debt for the remainder. This mortgage being foreclosed, he and his wife executed another mortgage on the same land to obtain money to pay off the first mortgage debt; (7) that on October 12, 1893, Henry L. Stanley and his wife conveyed the land in controversy to the appellant Ackerman, and on the same day, and as a part of the same transaction, Ackerman reconveyed the land to Stanley and wife, to be held by them by entirety; (8) that there was no consideration for either of the said conveyances, but they were both made for the purpose of placing the title to said real estate in the joint names of Henry L. Stanley and his wife, with the full knowledge on their part that the land would thus be placed beyond reach of the creditors of Henry L. Stanley, and the further purpose of cheating, hindering, delaying, and defrauding such creditors; (9) that until several days after her husband's death, Comfort E. Stanley had no knowledge at any time that her husband was indebted to anyone except as to the mortgage debt mentioned in finding six, and also a debt due to the appellant, Walker, which latter debt is likewise secured upon the property for which the indebtedness was incurred; (10) that the land in controversy, on October 12, 1893, when it was conveyed to Henry L. Stanley and wife to be held by entirety, was worth \$3,200.00; (11) that Henry L. Stanley was then insolvent, and so remained

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until his death, November 6, 1893; (12) that on November 21, 1893, Comfort E. Stanley was appointed administratrix of her husband's estate, and is claiming to be the owner of the real estate in controversy by reason of the conveyance mentioned in finding seven; (13) that the estate of Henry L. Stanley is insolvent; (14) that the mortgage mentioned in finding six has been foreclosed, and there remained a balance of the judgment thereon due and unpaid after the sale of the mortgaged land, which balance is still unpaid; (15) that other claims filed and allowed against said estate, and claims filed but not allowed, all remain unpaid; (16) that appellant's several claims, in the amounts named, are just claims against said estate; (17) that all said indebtedness was contracted and in existence on the 12th day of October, 1893, when the transfers in dispute were made; (18) that the entire personal estate of Henry L. Stanley, over and above the \$500.00 taken by the widow, is \$125.80, being but a very small part of the indebtedness aforesaid.

There can be no question that the first conclusion of law, namely, that the conveyances under which Comfort E. Stanley claims title to the land in controversy are fraudulent and void as against the creditors of Henry L. Stanley, deceased, and that they should be set aside as to such claims. The findings show that at the time said conveyances were made, Henry L. Stanley was hopelessly insolvent; that he died a few days thereafter, still insolvent, and that his estate is insolvent. It is, besides, expressly found that the conveyances were made without consideration, and with the purpose of cheating, hindering, delaying and defrauding the creditors of Henry L. Stanley. These findings are abundantly supported by the evidence.

But, in its second conclusion of law, the court held that Comfort E. Stanley is the owner of the equitable

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title to the undivided one-half of said land. If this conclusion is correct, it must be by reason of the first four findings made by the court. The first finding shows the making of the deed to Henry L. Stanley by his father. One-half the consideration for this deed was remitted by way of advancement from the father to the son. The other one-half was paid to Henry L. Stanley's father by his wife's father, "as an advancement to him and his wife Comfort E. Stanley," and for which, shortly thereafter, the wife's father took a joint receipt from the young husband and wife, "showing that he had advanced her said sum of \$2,000.00." A father may make an advancement to his daughter by paying for land, the deed to which is taken by her husband in his own name. *Baker v. Leathers*, 3 Ind. 558. The father may thus make the advancement in the manner he thinks best, and, even if the daughter should object, still he might, by will or otherwise, thus fix the portion to be given to her. The property belongs to the father to do with as he deems best; and it does not follow that because the advancement is so made the land does not belong wholly to the husband. There is nothing in the findings or in the evidence to show that any trust in favor of Comfort E. Stanley was created by the deed to her husband. That deed was made to him by his father, and was completed and ready for delivery before his wife's father paid any part of the \$2,000.00. The matter was wholly arranged by the respective fathers. As a matter of fact, though, the daughter did give her consent that the payment by her father of a part of the purchase price of the land held by her husband should be taken as an advancement to her. By the joint receipt given by her and her husband to her father, she, so far as she had any control over the matter; ratified the act of her father, and thus agreed that the deed should be held by her husband as owner of the land.

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In *Hileman v. Hileman*, 85 Ind. 1, where a father had made an advancement to his daughter by reducing the price of land conveyed by him to her husband, it was held that the husband, in the absence of any agreement or understanding then had, was not liable to his wife, as trustee or otherwise, for the amount of the advancement. "The transaction," said the court, "amounted to a gift to the husband."

The record also shows, in the case at bar, that the theory upon which the appellee, Comfort E. Stanley, proceeded during the whole trial was, that she was the owner in fee simple of all the land in controversy by virtue of the deeds found by the court to be fraudulent. The complaint asked simply to have these deeds set aside, and that the land be sold to pay the debts of the decedent. She answered to this by a general denial, and by filing a cross-complaint asking to have her title quieted as to all the land. Her evidence as given in the record shows the same theory, and the court expressly finds this to have been her claim. But it has often been held that a party cannot seek relief on one theory in the pleadings, still less in the pleadings and evidence introduced, and then ask to have relief given on another theory. *Johnson v. Pontious*, 118 Ind. 270, and cases there cited.

In addition, there can be no question that the legal title to the land in controversy was in Henry L. Stanley, under the deed from his father. Even, therefore, if the appellee might, against the appellant's complaint, defend her right to an undivided one-half of said land by an appeal to the equity side of the court, still she then would be required to do equity as well as to ask it. The court finds that she received from her husband the two town lots, with improvements thereon, as an equivalent for the amount paid by her father towards the purchase price of the land held by

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her husband. This town property she still holds under the claim that she did not agree to accept it for the purpose for which her husband gave it to her. This is not doing equity, but standing on her legal right. In a court of conscience, she cannot have the legal right to one property, given to her on equitable considerations in relation to the other, and also have the equitable right to the other property against the legal right of its owner, who had given her the equivalent of any possible equitable interest she might have in it. If law prevails over equity as to the deed held by her, so should it also as to the deed held by her husband.

Appellee must therefore fail, whether we consider her legal rights or her equitable claims. It was of course competent for the husband and wife so to transfer this property that they might hold it by entail, whatever reasons they might have for so doing, provided, only, they did not thus prejudice the rights of *bona fide* creditors. The legal title of the husband, which he retained for over nine years, will be upheld for the protection of such creditors. In the absence of any lien under which she is liable, the widow has, of course, her statutory one-third interest in her husband's lands; but the facts in this case do not disclose any further interest of hers against creditors in the land in controversy.

The court therefore erred in its second conclusion of law, while, in the third conclusion of law, it should have been found that all, instead of the undivided one-half of the land in dispute, ought to be sold in payment of the debts of the estate, subject to the widow's rights in the undivided one-third thereof.

The judgment is reversed, with instructions to the court to restate its conclusions of law in accordance with this opinion, and to render judgment thereon in favor of the appellants.



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## ON PETITION FOR REHEARING.

HOWARD, J.—It was alleged in the complaint in this case that, for the purpose of defrauding appellants and other creditors, appellee and her husband had, through a third person, caused certain real estate held by her husband to be conveyed to the husband and wife to be held by them by entireties. The prayer was that the deeds for such conveyance be set aside as fraudulent and void as to said creditors. To this complaint the appellee filed a general denial. She also filed a special answer, setting out the facts as to how the deed to the land had originally been made to her husband, as stated in the principal opinion. It is further averred in the special answer that, at the time the land was originally deeded to her husband, and the advancement made to her by her father, it was her intention and that of her husband "to have the said title made to them jointly," and that "the same would have been so made if they or either of them had been present when said deed was written;" also, that she and her husband always intended to have said title made to them as husband and wife, and that the conveyances claimed in the complaint to have been fraudulent were made to carry out such intention, and without any fraudulent design on the part of either. To this paragraph of answer the court sustained a demurrer. Appellee also filed a cross-complaint claiming to be the owner in fee simple of the land in controversy, and asking that her title be quieted. After finding the facts, the court, as its first conclusion of law, found that the deeds in question "are fraudulent and void as against the creditors of said Henry L. Stanley, deceased, and that the same should be set aside as to said claims." It does seem to us that this was a complete disposition of all the

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issues raised in the pleadings. But to this conclusion of law the appellee took no exception and made no objection. If, however, the position now taken by appellee were tenable, namely, that the husband from the beginning had held the land jointly with his wife and in trust for her, such conclusion of law would be unwarranted. By failing to except to the conclusion of law when made, we think, appellee precluded herself from making the contention here urged.

But appellee's whole argument rests upon an unsound basis. It is not true that appellee ever paid anything for the land, and consequently the authorities cited of cases where a wife had paid for land taken in the name of her husband are not here in point. The money was paid by her father, as he himself testified on the trial. It is true that the money was paid by him as an advancement to his daughter, as held in the principal opinion; but, as there also held, a father may make an advancement to his daughter by deeding land to her husband. The money belongs to the father, and he may make this disposition of it for the benefit of his child, if he so sees fit. Nor will this disposition of the advancement make the husband a trustee for his wife, unless the trust is expressly declared, or may be implied from the circumstances of the case, or unless there is a constructive trust by reason of fraud on the part of the husband in taking the deed in his own name.

In 1 Beach on Trusts and Trustees, section 164, it is said: "The rule under which a conveyance to a wife or child is presumed to be an advancement applies, in the absence of any modifying circumstances, to the relations of a husband or wife to a son-in-law. Where land is conveyed to a son-in-law in the distribution of an estate there will be no trust in favor of the daughter as his wife."

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In the same section the author, citing also the case of *Noe v. Roll*, 134 Ind. 115, says: "In the absence of any showing that a son-in-law was guilty of a breach of trust or confidence in taking title to the land in his own name, where conveyance was made to such son-in-law by a father as an advancement to his daughter, no trust results to the daughter under the statute, which creates an implied trust where the alienee, in violation of some trust, has purchased the estate with money not his own."

Indeed the case of *Noe v. Roll*, *supra*, cited by Mr. Beach, comes much nearer showing the trust relation than does the case at bar. It was alleged in that case that the father, desiring to make an advancement to his daughter, conveyed certain lands to her husband "to hold in trust for her and to her use and benefit; that he paid no consideration for said lands, and accepted and went into possession intending to execute such trust." There was no express trust in that case, as there is none in this; neither was there any claim there, as there is none here, that the husband practiced any fraud in having the title placed in his own name. The court held further that no implied trust was shown.

If appellee's father had wished to have the title to the land placed in her name jointly with that of her husband, as she now claims, he could have had the deed so drawn. He, however, chose to have the advancement made to her by putting the land in the name of her husband. The husband had nothing to do with the matter, save to accept the deed as made. The transaction does not show fraud; neither does it disclose any intended trust.

See further the well considered case of *Acker v. Priest*, 92 Iowa, 610, where numerous authorities are cited and discussed, and a like conclusion reached.

Petition overruled.

## CARROLL v. GREEN.

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162	6
148	362
167	386

[No. 17,801. Filed May 25, 1897. Rehearing denied Sept. 23, 1879.]

**ELECTION CONTESTS.**—*Ineligibility.*—*Bribery.*—*Evidence.*—*Constitution Construed.*—Under the provision of section 6, article 2, of the State constitution that "Every person shall be disqualified for holding office during the term for which he may have been elected, who shall have given or offered a bribe, threat or reward to secure his election," evidence that contestee offered to purchase the vote of witness at the general election at which he was a candidate was admissible in the trial of an election contest on the ground of ineligibility of contestee. *pp. 364, 365.*

**CONSTITUTIONAL LAW.**—Section 6, article 2, of the state constitution declaring persons elected to office disqualified from holding same by offering a bribe or reward to secure his election is self-executing and needs no legislative enactment to carry it into effect and operation. *p. 364.*

From the Martin Circuit Court. *Reversed.*

*A. J. Padgett and R. L. Ross, for appellant.*

*H. Q. Houghton, James B. Marshall and Hiram McCormick, for appellee.*

MCCABE, C. J.—The appellant contested the election of the appellee to the office of township trustee of Lost River township in Martin county, both parties being opposing candidates for that office at the general election of November 6, 1894.

The board of commissioners before whom the proceedings were begun sustained a demurrer to the contestor's petition or statement of grounds of contest, refused to allow him to amend it, and rendered judgment against him, from which he appealed to the circuit court. A trial of the contest there resulted in a finding and judgment against the contestant, the appellant, over his motion for a new trial.

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The error assigned calls in question the action of the court in overruling the motion for a new trial, and the questions involved in that ruling are the only questions presented by this appeal. During the trial the court refused to allow the appellant to prove that, on the night before the primary election at which appellee was nominated for said office, he went to the house of one John D. Powell, a legal voter in said township, and then and there gave him \$2.00 to procure and purchase his vote for appellee at said primary election.

The court also refused to allow the appellant to prove by James Philips that, on the day of said general election whereat said parties were opposing candidates for said office of township trustee for said township, to-wit: on November 6, 1894, the contestee gave said witness three dollars to vote for the said contestee at said election.

The ground of contest stated, under which this evidence was offered, is "that the contestee is ineligible to said office."

The second ground for a contest of an election as provided by the statute is: "When the contestee was ineligible." Section 6312, Burns' R. S. 1894 (4756, R. S. 1881).

Appellee's counsel seek to justify the ruling of the court on the ground that sections 1 and 2 of the act approved March 9, 1889, both require a conviction of the offense defined in each, before it can operate to disqualify or render ineligible a candidate for office. Sections 2327, 2328, Burns' R. S. 1894 (Acts 1889, p. 267).

This court is not agreed at present as to the proper construction to be placed on said section of the statute. But there is a constitutional provision affecting one of the questions involved in this appeal about

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which we are agreed. The sixth section of article 2, of the state constitution provides that: "Every person shall be disqualified for holding office during the term for which he may have been elected, who shall have given or offered a bribe, threat, or reward to secure his election." Section 87, Burns' R. S. 1894 (87. R. S. 1881). But it is ineligibility that is made the ground of contest by the statute, and that is the ground stated by the contestant in this case. Soule's Synonyms makes the word "ineligible" synonymous with the word "disqualified." The first definition of the word "ineligible" by Webster is: "Not eligible; not qualified to be chosen to an office." The term disqualified, therefore, as used in the constitutional provision just quoted, means the same thing that the word ineligible means, as used in the statute authorizing a contest.

The term "eligible," as applied to candidates for office, means capable of being chosen; the subject of selection or choice; also implying competency to hold the office if chosen. Constitutional and statutory provisions with reference to eligibility, therefore, are sometimes held to refer to capability of being chosen, as well as capability of holding. 19 Am. & Eng. Ency. of Law, 397, and authorities there cited; *State v. Bemenderfer*, 96 Ind. 374; *Carson v. McPhetridge*, 15 Ind. 327; *Smith v. Moore*, 90 Ind. 294; *Searcy v. Crow*, 15 Cal. 118; *People v. Leonard*, 73 Cal. 230, 14 Pac. 853.

The great weight of authority is to the effect that a constitutional provision like the one here in question is self-executing and needs no legislative enactment to carry it into effect and operation. *Commonwealth v. Walter*, 83 Pa. St. 105, 24 Am. Rep. 154; *Royall v. Thomas*, 28 Gratt. (Va.) 130, 26 Am. Rep. 335; *Brady v. Howe*, 50 Miss. 607.

There is no crime defined by the constitutional pro-

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vision quoted, but certain acts done, namely, giving or offering a bribe to secure election to office, are made to disqualify or render ineligible the person so doing to hold the office.

Therefore the circuit court erred in refusing to allow the appellant to prove that appellee had, on the election day, paid James Philips three dollars to vote for him for said office of township trustee. If it be true that he did so, that disqualified appellee from holding the office, and therefore rendered him ineligible.

Therefore the circuit court erred in excluding the second item of the offered evidence, and hence erred in overruling the motion for new trial, assigning such exclusion as one of the reasons therefor.

The judgment is reversed, and the cause remanded, with instructions to grant a new trial and for further proceedings in accordance with this opinion.

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ERWIN v. CENTRAL UNION TELEPHONE COMPANY ET AL.

[No. 18,101. Filed April 1, 1897. Rehearing denied Sept. 24, 1897.]

INJUNCTION.—*Use of Space Beneath Sidewalk.*—*Complaint.*—A complaint by an abutting landowner to enjoin the laying of conduits beneath the sidewalk, which does not allege that the plaintiff is the owner in fee of the soil to be invaded, is insufficient on demurrer. pp. 366-399.

PLEADING.—*Material Facts Not Alleged by Way of Recital.*—Material facts, essential to the existence of a cause of action, must be alleged directly and not by way of recital. p. 371.

From the Marion Circuit Court. *Affirmed.*

*E. E. Gates* and *G. E. Hume*, for appellant.

*R. O. Hawkins*, *H. E. Smith* and *J. B. Curtis*, for appellees.

148	365
148	106
148	265
159	561
148	365
161	330
148	365
167	558
148	365
169	681

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HACKNEY, J.—The appellant, Daniel P. Erwin, by his complaint in the lower court, sought to enjoin the appellees, the Central Union Telephone Company and the city of Indianapolis, from laying conduits, for conducting electric wires to be used in a general system of telephoning in said city, within the limits of the sidewalk along the south side of Ohio street, from Pennsylvania street eastward two hundred two and one-half feet. The complaint alleged the ownership by the appellant of three lots on the south side of said sidewalk for said distance of two hundred two and one-half feet east from Pennsylvania street, and that the space beneath the surface of said sidewalk along said distance was valuable and necessary for the uses of a large five-story hotel and business building, covering said lots, for sub-cellars or vaults which he, the appellant, had the right to construct, which he contemplated the early construction of and of which he would be deprived by the location of conduits. It was alleged that the company was proceeding to lay said conduits pursuant to a contract with the city authorizing the use for that purpose of the "streets, avenues, alleys and public places of said city;" said contract further providing that the work "should not interfere with existing surface or underground structures, including \* \* \* sidewalks" any and all of which "must be replaced by said company."

It was alleged, also, that prior to the making of said contract the city had by various ordinances recognized the right of appellant to construct vaults, cellars, etc., under abutting sidewalks, and that he had not agreed in any manner to the use of said sidewalk by said company.

The circuit court sustained the demurrer of the appellees to said complaint, and that ruling presents the only questions to be reviewed. Appellees have not



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avored us with brief or argument in support of the ruling of the lower court, and we are not advised as to the theory upon which that ruling was made. The brief of the appellant's learned counsel urges several propositions against the ruling of the trial court, that which is at the basis of all others being that the appellant was the owner in fee simple of the ground over which the sidewalk is laid. It is, of course, recognized that the public hold an easement for the purposes of travel upon the surface, but it is claimed that the use to which it is proposed to subject the earth beneath the walk is a new servitude, not contemplated in the dedication of the street to public uses.

It must be conceded that the appellant's theory can not stand without allegations sufficient to require the inference that he is the owner of the fee in the soil to be invaded. The exact allegation in this respect is that he "is the owner in fee simple of the following described real estate, to-wit: Lots 10, 11, and 12, in square 44, in the city of Indianapolis, county of Marion, State of Indiana, having a frontage on the south side of Ohio street of 202½ feet." There is an absence of allegation that the appellant owned the fee in the walk or street, or that the walk or street was dedicated to the public use by one who at the time owned the fee in both the street and the lots, or by one who had ever owned the lots. In other words, from any allegation it does not appear that the entire street, including sidewalks, was not or may not have been dedicated by the owner of the lots on the north side of Ohio street, and that the fee belonged to and still goes with such lot. This suit does not relate to any surface use of the sidewalk, or to the impairment of any of the easements of ingress, egress, light and air. It relates alone to an act imposing a servitude upon the fee, in no manner affecting a right which the appellant might

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claim independently of an ownership of the fee. As a question of pleading, therefore, the inquiry is presented as to whether a right which could only arise from an ownership of the fee will be presumed to exist without an allegation of the ownership of the fee. As a general proposition allegations must be stronger than to merely suggest an inference, they must be so strong as to enforce the inference which is necessary. *Brown v. Brown*, 133 Ind. 476; *Nysewander v. Lowman*, 124 Ind. 584; *Cummins v. City of Seymour*, 79 Ind. 491.

Should the case in hand be regarded as an exception to the general rule? We must answer that we observe no reason for such an exception. We do not overlook the fact that the courts often express their holding, *that the conveyance of a lot conveys to the center of the street upon which the lot abuts*, but we have met with no case, and venture the assertion that none exists, holding that the conveyance of a lot will carry the fee in a street, which fee the grantor never owned. We do not believe that it was even intended to be held that one who dedicated a street to the public use parted with his fee in one-half of the street to those who owned the real estate on the opposite side of the street. The owner on the opposite side of the street might acquire easements which would pass by the conveyance of his property, and those of such a character as could not be taken from him by the owner of the fee who dedicated the street, but if he should assert a right depending upon his ownership of the fee, his easements would not become the equivalent of such fee. It is a matter of common observation that streets are not always opened and dedicated by persons owning the lands on both sides of such streets. In cases where the lands are not so owned we observe no reason for holding that the fee in one-half of the street passes from its owner and attaches to the lands

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on the opposite side, those of another. To hold the complaint before us sufficient against the demurrer of the appellees, we must presume that Ohio street was dedicated by one owning the lands or lots on the south side of the street, or that the fee passed to such lots by independent conveyance.

It is not the rule that strained presumptions are indulged in favor of the pleader, and, in our opinion, they should not be indulged in this case. We are aware that cases seem to hold differently. *Terre Haute, etc., R. R. Co. v. Scott*, 74 Ind. 29; *Terre Haute, etc., R. R. Co. v. Rodel*, 89 Ind. 128. The first was an action for damages for the obstruction of the easement of ingress and egress, where possibly an ownership of the fee was not indispensable, but where such ownership was alleged to exist by reason of the ownership of the abutting lots. The description there alleged was not questioned before the court, as expressly stated in the opinion. The question considered and decided was not one of pleading, but was as to whether the public acquired the fee in a street dedicated, or whether such fee followed the lot from which the street was dedicated. In the latter case, the reported opinion does not give the description employed, but states that "The property was specifically described, and this description was followed by the statement 'that said real estate abuts on First street, in the city of Terre Haute, and the defendant unlawfully and without right has taken possession of said First street.'" This was held sufficient after verdict, which, we have no doubt, was correct. But, in this case and the former, reference was made to *Cox v. Louisville, etc., R. R. Co.*, 48 Ind. 178, as supporting the doubtful conclusion that to allege the ownership of a lot is to allege the ownership of the fee to the center of the street upon which the lot

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abuts. In *Cox v. Louisville, etc., R. R. Co.*, *supra*, the complaint contained the allegation that the plaintiff "is now, and has been for thirty years, the owner of the fee simple of said Fifth street, from the west line of said property to the center of said street," and that the railroad company had laid its track "upon that portion of Fifth street above described, of the fee simple of which the plaintiff was then, and has ever since been, and is now, the owner." There was no room to question the sufficiency of the allegation of the ownership of the fee in the street, and the case turned upon the question as to whether a dedication carried the fee to the public, or whether it remained in the landowner and followed his grant of the abutting lots.

While the cases of *Terre Haute, etc., R. R. Co. v. Scott*, *supra*, and *Terre Haute, etc., R. R. Co. v. Rodel*, *supra*, appear to be at variance with our present holding, we do not believe that the learned judges who wrote the opinions in those cases intended to be understood as holding that an allegation of the ownership of a lot necessarily raised the inference, against a demurrer, that such ownership extended to the center of the street upon which the lot abutted. To the extent that they may so hold we deny their soundness. In our conclusion, however, we do not deny the proposition that one who dedicates a street, retaining the adjoining lots, retains the fee in the street, which fee will pass from him by a conveyance of the lots. This proposition is very different from the one that to plead the ownership of a lot raises necessarily the inference, as a question of pleading, that such ownership includes the fee in the street as having been held in common with that in the lots.

The complaint was, therefore, insufficient, and the judgment of the lower court is affirmed.

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## ON PETITION FOR REHEARING.

HACKNEY, J.—The appellant insists that in connection with the allegations of his complaint we should have considered, from judicial notice, that, pursuant to several early acts of the legislature, the property, lots and street in question were located, platted and dedicated in common and from a single tract by commissioners of the State, whose plats appear of record in the office of the Secretary of State.

Were we to accept judicial notice of the occurrences mentioned, they would be no stronger than an allegation that over sixty-five years ago the fee in the street attached to that in the lots by reason of a conveyance of the lots to the appellant's most remote grantor. This would be far less than an allegation of present ownership. A right dependent upon present ownership, it has often been held, is not alleged by alleging an ownership at a time past. *Wintermute v. Reese*, 84 Ind. 308; *Brown v. Brown*, 133 Ind. 476; *Craig v. Bennett*, 146 Ind. 574.

In that event the complaint would be subject to the objection made against it in the original opinion, that it would not allege the appellant's ownership of the fee in the street or sidewalk at the time he sought to enjoin the acts of the appellees.

Nor are we impressed that this omission is supplied by a recital allegation that the appellees were about to deprive the appellant of the legal right to employ the sidewalk for subterranean vaults and storerooms. Material facts, essential to the existence of a cause of action, must be alleged directly and not by way of recital. *Jackson School Tp. v. Farlow*, 75 Ind. 118; *Shirk v. Mitchell*, 137 Ind. 185; *Louisville, etc., R. W. Co. v.*

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Totten & Hogg Iron, etc., Co., v. Muncie Nail Co., et al.

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*Kendall*. 138 Ind. 313; *State v. McCormick*, 141 Ind. 685.

We are fully satisfied that our original conclusion was correct.

The petition is overruled.

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THE TOTTEN & HOGG IRON AND STEEL FOUNDRY COMPANY, INTERVENER, ETC., v. THE MUNCIE NAIL COMPANY ET AL.

[No. 18,301. Filed September 24, 1897.]

**MECHANIC'S LIEN.**—*Appointment of Receiver for Property.*—*Sale of Property.*—A mechanic's lien is not affected by the appointment of a receiver for the property; and upon the sale of the property by the receiver the lien attaches to the proceeds of the sale. p. 374.

**SAME.**—*Machinery.*—*Statute Construed.*—Under the provision of section 7255, Burns' R. S. 1894, a lien may be acquired on an engine and machinery by one furnishing repairs therefor, notwithstanding such repairs were not attached to the machinery at once, but set upon blocks near by, to be ready when the old parts could be no longer used. pp. 374-376.

From the Delaware Circuit Court. *Reversed.*

*J. N. Templer, C. C. Ball and E. R. Templer*, for appellant.

*J. W. Ryan and W. A. Thompson*, for appellees.

HOWARD, J.—The original action in this case was by a stockholder of the appellee company, showing an indebtedness of the company to an amount in excess of \$100,000.00, the bringing of attachment and garnishment proceedings by creditors, etc., and asking that the company be adjudged insolvent and a receiver be appointed to close up its affairs. This was accordingly done, and the receiver sold all the property of the company for \$22,600.00.

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Among the claims allowed against appellee was one in favor of appellant. After the allowance of its claim appellant filed a petition as intervener, asking that the claim be declared a preferred lien upon the funds in the hands of the receiver so derived from the sale of appellee's property.

From the intervening petition it appears that the appellant company "contracted with the said The Muncie Nail Company to manufacture, finish, and furnish for use in and to become a part of the nail mill and rolling mill thereof at Muncie \* \* \* \* one 26 x 48 cast cylinder, weighing 4,450 pounds, \* \* \* and the same was then and there manufactured, finished, and furnished for use in said nail mill and rolling mill by your petitioner, and was actually used therein by the said The Muncie Nail Company."

Notice of intention to hold a mechanic's lien for the value of the machinery so furnished was duly given.

The evidence, which is without dispute, shows that appellant, doing business at Pittsburgh, had furnished engines and other machinery for use in appellee's mill; that in April, 1893, the cylinder of appellee's large engine was out of repair, and that it was to replace this old one that the cylinder here in question was furnished.

The contract was made by telegrams and letters. Appellee's first telegram was: "Have you a duplicate cylinder, twenty-six by forty-eight, same as our big engine? Answer quick." The answer was: "Have nothing in stock but can make one." Another telegram sent on the same day by the president of the appellee company, then away from home, reads: "Cylinder large engine cracked; how soon can you duplicate it?" The answer to this was: "Cannot tell, about thirty days; pattern has been changed. Will do our best; must have old cylinder." A reply from the presi-

dent sent on the same day said: "Get everything ready to make cylinder. Will give instructions when I reach home. Must work day and night to finish it." Other correspondence followed, and the cylinder was completed and sent to Muncie. Meanwhile the old cylinder was temporarily repaired and continued to be used in the engine; and when the new cylinder arrived it was set on blocks within a few feet of the engine, but was not then placed therein. The court found the evidence insufficient to show that the appellant was entitled to have its claim declared a preferred lien upon the funds in the hands of the receiver.

If appellant had acquired a lien upon the mill and other property of appellee, such lien could not be lost by the subsequent appointment of the receiver (*J. W. Dann Mfg. Co. v. Parkhurst*, 125 Ind. 317, and authorities there cited; 15 Am. & Eng. Enc. Law, 112); and on the sale of the property by the receiver the lien would attach to the proceeds. As said in the last authority cited: "The money derived from the sale of property upon which there is a mechanic's lien will be treated by a court of equity, as it would treat the property before a sale; and such court will follow it into the hands of the party who has converted the property into money."

It is agreed that whether a mechanic's lien had been acquired in this case must depend upon the provisions of section 7255, Burns' R. S. 1894 (Acts 1889, p. 257), which declares: "That contractors, \* \* \* and all persons performing labor or furnishing material or machinery for erecting, altering, repairing or removing any house, mill, manufactory \* \* \* or other structure, may have a lien separately or jointly upon the house, mill, manufactory \* \* \* or other structure which they may have erected, altered, repaired



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or removed, or for which they may have furnished material or machinery of any description and on the interests of the owner of the lot or land on which it stands, or with which it is connected, to the extent of the value of any labor done, or material or machinery furnished, or both."

That the machinery in this case, the cylinder for the stationary engine in appellee's mill, was furnished by appellant at appellee's special instance and request, was fully alleged and proved, as appears from the record; and it is not easy to see why the lien given by the statute was not acquired by appellant. But it is said, that although appellee made a special order for the machinery, and appellant furnished the same according to the specifications, yet it turned out that appellee's old cylinder was sufficiently repaired to run in the works for the time being, so that the new cylinder was not put into the engine but was set on blocks near by to be ready as soon as the old cylinder could no longer be used; and, therefore, that the new cylinder, not being actually attached to and placed in the engine, was no part of the structure, and hence not subject to the statutory lien. This seems to us to wholly mistake the spirit, if not the letter of the law. Appellant had done all required by the statute to entitle it to the lien; that is, furnished the machinery for use in appellee's mill; it was for appellee to go on and complete the work by setting up and using the machinery so furnished. If appellant had done its part, any right thus acquired could not be defeated by a failure to act on the part of appellee.

In *Scott v. Goldinhorst*, 123 Ind. 268, it was contended that a mechanic's lien was not authorized, for the reason, apparently, that the owner had abandoned the construction of his building after laying the foundations. Judge Mitchell there said: "We are not im-

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pressed with this view of the subject. \* \* \* Laborers and material men, who are employed to do work, or furnish material, with the purpose of the employer, then formed, to continue the work of the completion of a building for which the foundation is thus being prepared, are entitled to acquire a lien under the statute. \* \* \* If the work be done or materials furnished for the use or purpose designated in the statute, the right to acquire a lien is complete, and the law is not so unjust as to defeat the right to the lien, because the owner may for any reason fail to complete the work."

Cases which hold that material men who furnish material to a contractor will not be given a mechanic's lien without showing that such material was actually used in the building upon which the lien is sought, are not in point. Here the machinery was furnished to the owner in good faith for use in its own building, and such owner may not, as against such good faith performance, plead a failure on its own part to use the material so ordered and furnished.

It turned out that the old cylinder could be used longer than was anticipated at the time it was first found cracked and the new one ordered in its place. This, however, could not affect the rights of those who furnished the new cylinder as so ordered. Moreover, the cylinder was accepted at the mill and was afterwards sold by the receiver with the rest of the mill property being part of the item, "one large engine and machinery." In effect, it had become a part and parcel of the machinery of appellee's mill. Appellant, as we think, had acquired a lien upon the mill property, and this lien was in equity transferred to the fund in the hands of the receiver.

Judgment reversed with instructions to grant a new trial.

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**BOLLENBACHER ET AL. v. WHISNAND, ADMINISTRATOR.**

[No. 18,402. Filed September 24, 1897.]

**DECEDENTS' ESTATES.—*Appeal.—How Perfected.***—An appeal by the administrator of a decedent's estate cannot be prosecuted under the code governing appeals in general, but must be taken under the statute regulating the settlement of decedents' estates, sections 2609, 2610, Burns' R. S. 1894 (2454, 2455, R. S. 1881), which provide that the appeal bond shall be filed within ten days after the decision complained of is made, unless the time is extended by the court to which the appeal is taken, and that the transcript shall be filed in this court within thirty days after filing the bond.

From the Monroe Circuit Court. *Appeal dismissed.*

*William H. Paynter*, for appellants.

*Louden & Louden*, for appellee.

**MCCABE, C. J.**—This was a proceeding by petition on the part of the appellee, as administrator with the will annexed of George W. Bollenbacher, deceased, against the widow and heirs of deceased, and others interested, to sell real estate of which the testator died seized, to make assets to pay debts of said decedent, and, as incidental thereto, to set aside certain tax sales of said real estate.

A trial of the issues formed resulted in a finding that the facts stated in the petition were true, and an order and decree setting aside the tax sales and declaring a lien in favor of some of the children of the decedent who had purchased at the tax sales; also an order was made directing the administrator to sell the real estate upon certain terms specified in the order, in order to raise money to pay the debts of the decedent. This order was made on the 8th day of Novem-

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ber, 1895. The motion for a new trial filed by the appellants was not overruled until the December term, on the 18th day of January, 1896, when they prayed an appeal to this court. No appeal bond was ever filed by them, nor did they offer to file such a bond.

They filed the transcript here with errors assigned thereon on the 6th day of November, 1896, nearly ten months after the judgment was rendered, dating the rendition of judgment from the date of overruling the motion for a new trial. This would have been in time if this appeal may be prosecuted under the code. Section 645, Burns' R. S. 1894 (633, R. S. 1881). But the appellee contends that this appeal can only be prosecuted by complying with the provisions of the statute regulating the settlement of decedents' estates, and has moved to dismiss the appeal for failure to so comply with the provisions of that statute. Sections 2609, 2610, Burns' R. S. 1894 (2454, 2455, R. S. 1881), provide that an aggrieved person may prosecute an appeal from any decision of a circuit court growing out of any matter connected with a decedent's estate upon filing a bond, with surety, conditioned for the diligent prosecution of the appeal, etc., and that the bond shall be filed within ten days after the decision complained of is made, unless the time is extended by the court to which the appeal is taken, and that the transcript shall be filed in this court within thirty days after filing the bond. No extension has ever been granted by this court in this case. It is settled by the decisions of this court that an appeal in just such a case as the one now before us, can only be prosecuted by a compliance with these provisions, without which the appeal must be dismissed. *Galentine v. Wood*, Admr., 137 Ind. 532; *Rinehart v. Vail*, Admr., 103 Ind. 159; *Webb v. Simpson*, 105 Ind. 327; *Seward v. Clark*, 67 Ind. 289; *Taylor v. Burk*, 91 Ind. 252; *Bake v. Smiley*, 84

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Ind. 212; *Koons v. Mellett*, 121 Ind. 585; *Harrison Nat'l Bank v. Culbertson*, 147 Ind. 611, and cases there cited.

On the authority of these cases we are compelled to sustain the appellee's motion to dismiss the appeal.

The appeal is therefore dismissed.

## CITY OF VALPARAISO v. PARKER ET AL.

[No. 18,215. Filed June 8, 1897. Rehearing denied Sept. 24, 1897.]

**DRAINS.—Sewerage.—Statute Construed.**—The word "drainage" as used in section 3598, Burns' R. S. 1894 (Acts 1891, p. 304), providing for the drainage of cities, includes sewerage. *pp. 380-382.*

**SAME.—Sewerage.—Practice.—Statute Construed.**—When a petition for drainage is filed in the circuit court, under the provision of section 3598, Burns' R. S. 1894 (Acts 1891, p. 304), the only question to be tried is the amount of benefits or damages to the landowners outside the city limits, provided such issue is properly presented by remonstrance. *p. 382.*

**SAME.—Viewers.—Objections to.—When Waived.**—In a proceeding to construct a city drain, under section 3598, Burns' R. S. 1894 (Acts 1891, p. 304), the failure of an interested party to appear and object to the committee appointed to assess the benefits and damages until after the committee had reported the benefits and damages to the common council, and such petition had been docketed in the circuit court, constitutes a waiver of the right to object. *pp. 383, 384.*

From the Porter Circuit Court. *Reversed.*

*A. D. Bartholomew*, for appellant.

*N. L. Agnew* and *D. E. Kelly*, for appellees.

**MONKS, J.**—Appellant brought this proceeding under the act of 1891 (Acts 1891, p. 304), sections 3598-3606, Burns' R. S. 1894, to procure an outlet for the drainage of said city. Upon a trial of said cause by the court, a judgment was rendered against appellant dismissing said proceeding.

148	379
180	594

148	379
187	379
187	380

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It is set forth in the petition that the drain petitioned for commences at the outlet of the present sewer, and that it is to obtain an outlet for the waters and sewerage of said city which accumulates at and near the outlet of said sewer, and "that the drain is necessary to effectually drain and carry off the sewerage of said city; that 1265 feet of said drain is to be constructed of sewer pipe, and the remainder thereof is to be an open ditch with grade," etc.

Appellees, landowners outside the limits of the city, filed a remonstrance, setting up that the sole and only object of the proceeding was to obtain an outlet for the sewerage of said city, and not for the surface water thereof. Appellant's motion to strike out said remonstrance, and also its demurrer thereto for want of facts were overruled.

It is insisted by appellees that the act of 1891 under which said proceeding was brought does not authorize the construction of a drain to furnish an outlet for the sewers or sewerage of a city; that no power was given appellant by said act to commence a proceeding where the primary object sought is to construct a sewer to carry off sewerage and not for the drainage of surface water.

Section 1, of said act, being section 3598, Burns' R. S. 1894, provides "That whenever the common council of any city shall find it necessary for the successful drainage of said city to construct any drain as an inlet or as an outlet, leading into or out of said city, they shall cause a survey," etc. After all the preliminary steps required are taken, it is provided that the city council may file a petition in the circuit court of the county setting forth that said inlet or outlet is necessary to effectually drain said city.

We think that the word drainage as used in said act includes sewerage. Formerly the word sewer was

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defined to be a fresh water trench artificially made, encompassed with banks on both sides to carry surface water into the sea. Callis on Sewers, 80; 1 Crabb Real Prop., section 113; Woolrych's Law of Sewers, p. 1, Webster defines "sewer:" "A drain or passage to carry off water and filth under ground." For sewerage or sewage the definition given is: "The general drainage of a city or town by means of sewers." For drain he gives: "A trench; a water course; a sewer; a sink." In *Bennett v. New Bedford*, 110 Mass. 433, the court held that a structure under ground constructed by a city not only to carry off sewage from the houses and streets, but also to conduct surface water, and the waters of a natural stream is a common sewer.

It is said in 6 Am. & Eng. Ency. of Law, p. 2, that "The word 'drain' has no technical or exact meaning. As generally understood, it means an artificial channel or trench through which water or sewage is caused to flow from one point to another. As generally understood in law the term 'sewers' has reference to the underground canal or passage by means of which cities are drained and the filth and refuse liquids are carried to the sea, river, or other place of reception."

It may be true that when the term drainage is used with reference to lands, that ordinarily drainage of waters is intended, but it is clear that when that term is used with reference to a city or town it includes sewerage, that is, such drainage is and may be used for the removal of surface and storm water, the overflow of fountains, cisterns, public hydrants, water-troughs, water-closets, sinks, all filth and refuse liquids, and the diversion of natural water courses.

It is provided in section 6 of said act, being section 3603, Burns' R. S. 1894, that "This act shall be liberally construed to promote the drainage of cities, the reclamation of wet lands and the improvement of the public health."

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The removal of such water and filth is necessary to the health of a city, and such removal constitutes the drainage of a city, and the means of obtaining an outlet therefor is provided by said act. It would be a narrow construction of this statute for the drainage of cities and the improvement of the public health to limit the same to drains for the removal of surface and storm water alone, unmixed with filth and refuse liquids of any kind. Such a construction would be contrary to the express language of the statute and would defeat the intention of the legislature.

Appellant was authorized by the act in question to commence this proceeding to procure an outlet for the "waters and sewerage" of said city as set forth in said petition.

Section 1 of said act, being section 3598, *supra*, provides that, when the city files the petition for drainage, the same should be conclusive of every fact required to be alleged, except as to the assessment of benefits or damages, and shall be *prima facie* conclusive thereof. The only question to be tried in the circuit court was the amount of damages or benefits to the landowners outside the city limits, provided that issue was properly presented by remonstrance. It follows, therefore, that the court erred in overruling appellant's motion to strike out the remonstrance, and also in overruling the demurrer thereto.

The act in question does not require that a drain constructed thereunder shall commence at the city limits, but the same may be constructed from a point within the city limits. The statute (3598, *supra*) requires that before the petition is filed by the city, the city shall appoint a committee of three disinterested householders or freeholders of the county to view the proposed inlet or outlet and the lands without the city to be affected thereby, and assess the benefits and



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damages of the said lands including the benefits to the city, and that the owners of the said lands shall be given three days' notice of when the committee will view said outlet and lands, and that they are requested to be present with a right to be heard for or against any assessment that shall be made or be proposed to be made against said lands.

After the petition had been docketed in the court below, appellees filed an affidavit that Samuel A. Campbell, one of said committee, was not a disinterested person, but was related to certain taxpayers of said city, and that he had participated in all the assessments and deliberations of said committee, and moved the court to dismiss said cause and strike the same from the docket, for the reason that the acts of said committee were void.

This motion was overruled, and this ruling is assigned as a cross-error by appellees.

Appellant contends that appellees should have presented this objection to the committee at its meeting to view the outlet and lands, and that not having done so, the objection was waived.

It is the general rule that such objections must be made at the earliest opportunity, so that the proceeding shall not be allowed to proceed to a fruitless result with accumulation of cost; and if not so made they will be deemed to be waived. *Bradley v. City of Frankfort*, 99 Ind. 417, 421, and cases cited; *Mills on Em. Dom.* (2d ed.), section 227, and cases cited; *Lewis on Em. Dom.*, section 407.

Appellees were notified and requested to appear before said committee, and had the right to appear and protect their rights. They made no objection to said Campbell serving as a member of said committee until after said committee had reported to the common council, and the petition for the drainage of the city

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had been docketed. Having failed to make said objection at the first opportunity, the same even if tenable, was waived.

The court did not err therefore in overruling appellees' said motion. It is not necessary for us to decide, and we do not decide, whether or not such relationship to one or more taxpayers of the city disqualified said Campbell to act as a member of said committee.

It is claimed by counsel for appellees that affidavits were filed showing that appellees had no knowledge of the relationship of Campbell to said taxpayers until after the committee filed their report.

We have examined the record and have been unable to find any such affidavits.

The judgment is reversed with instructions to sustain appellant's motion to strike out the remonstrance filed October 23d, 1896, and for further proceedings in accordance with this opinion.

## SCHLEUTER v. CANATSY ET AL.

[No. 18,150. Filed October 5, 1897.]

148	384
157	8

148	384
158	380

148	384
160	522

148	384
165	338
165	408

148	384
108	356

**SPECIAL FINDINGS.**—*Habeas Corpus.*—*Statute Construed.*—Section 560, Burns' R. S. 1894 (551, R. S. 1881), providing that the court shall, at the request of either party, make a special finding of the facts and state the conclusions of law thereon, does not apply to *habeas corpus* proceedings. p. 335.

**HABEAS CORPUS.**—*Motion to Quash.*—*Practice.*—Overruling a motion to quash a writ of *habeas corpus* tests the sufficiency of the application for such writ. p. 335.

**PARENT AND CHILD.**—*Custody of Child.*—In a controversy for the custody of a child, whether between the father and mother, or between them, or either of them and third persons, the welfare of the child is paramount to the claims of either parent, and the order of court should in all such cases be made with regard alone to the best interests of the child. p. 338.

**HABEAS CORPUS.**—*Motion to Quash.*—The motion to quash a writ of *habeas corpus* admits the truth of the allegations in the writ the same as does a demurrer to a pleading. p. 338.

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From the Marion Circuit Court. *Affirmed.*

*Elmer E. Stevenson*, for appellant.

*G. W. Stubbs* and *C. E. Averill*, for appellees.

MONKS, J.—This was a *habeas corpus* proceeding brought by appellee to obtain the custody of a child under four years of age, from appellant, the father of such child. The proceedings resulted in a judgment awarding the custody of the child to appellee.

Appellant has assigned errors: *First*, the court erred in overruling his motion to quash the writ of *habeas corpus*; *second*, the court erred in overruling his motion for a new trial; *third*, the court erred in its conclusions of law.

We cannot determine the question presented by the second assignment of error, for the reason that the same depends upon the evidence which is not in the record. Besides, such assignment of error is waived by the failure of appellant to argue the same in his brief. The third error presents no question, for the reason that the court did not make a special finding and state conclusions of law thereon, under the code. Moreover, section 560, Burns' R. S. 1894 (551, R. S. 1881), providing that the court shall, at the request of either party, make a special finding of the facts and state the conclusions of law thereon, does not apply to *habeas corpus* proceedings. *McGlennan v. Margowski*, 90 Ind. 150, 154; *Garner v. Gordon*, 41 Ind. 92; section 1132, Burns' R. S. 1894 (1118, R. S. 1881).

The trial court overruled appellant's motion to quash the writ of *habeas corpus*. Such motion tests the sufficiency of the application for the writ. *Willis v. Bayles*, 105 Ind. 363, 364; *Milligan v. State, ex rel.*, 97 Ind. 355; *McGlennan v. Margowski, supra*, p. 153.

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It is alleged in the application "that appellees are husband and wife, living together and residing in the city of Indianapolis; that appellant was the husband of Flora E. Schleuter, who was a sister of the appellee, Mary Canatsy; that said Flora died November 27, 1892, leaving an infant daughter, aged, on said date, one day, to whom was given the name of Flora E. J. Schleuter; that after the birth of said child, and at a time when said Flora E. Schleuter knew that she had but a few hours to live, the said Flora E. Schleuter and appellant, her husband, gave said child to appellees to rear and care for as their own; that appellees then and there accepted said trust, and promised and agreed with the mother, said Flora E. Schleuter, and appellant, father of said child, that they would faithfully care for and rear said infant, in all respects as if she were their own child, and that they, from the 27th day of November, 1892, have faithfully discharged their duties towards said child in all respects as if she had been their own, and have become greatly attached to said child, and love it as if it were their own, and said child has become greatly attached to appellees and loves them as her parents; that from that day until the 4th day of October, 1896, appellees have maintained, clothed and cared for said child in health and in sickness, wholly without aid or assistance from appellant, during which time appellant wholly abandoned the care, custody and keeping of said child to appellees; that appellees are ready, able and willing to adopt said child as their heir, according to the laws of the State of Indiana, and desire so to do; that on October 4, 1896, appellant forcibly seized the person and body of said child, Flora E. J. Schleuter, without the knowledge or consent of appellees, and now forcibly restrains her of her liberty and deprives appellees of the possession of said child by forcibly confining

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her in his, said appellant's, dwelling house in the city of Indianapolis; that said appellant is not a fit person to have the care and custody of said child; that he is a person of immoral character; that since the death of his wife, Flora E. Schleuter, he has associated and consorted with prostitutes and persons of bad repute for chastity and virtue, for some of which he has been arrested, and on pleas of guilty has been fined in the police court of Indianapolis; that the surroundings and companionship to which said child will be subjected will not be, and are not such as will be conducive to the welfare and best interest of said child, in this, to-wit: that said appellant has taken said child to his home in said city of Indianapolis, and has placed her in charge and care of his present wife, Mary Schleuter; that the care and training of said child will devolve upon said Mary Schleuter, who is not a fit or proper person to have the care and training of said child; that she is a person of immoral character; that in the latter part of August, prior to her marriage to appellant, she associated with persons of bad moral character and of bad repute for chastity and virtue; that on July 31, 1894, she was found and arrested by a member of the police force in a house of ill fame in the city of Indianapolis, and incarcerated in the police station, and there slated on a charge of being a prostitute under an assumed name of Minnie Scott, and on the next day she was arraigned under said assumed name in the police court of said city and entered a plea of guilty to the charge of being a prostitute, and was then and there adjudged to pay a fine and cost by said court; that said appellant was prior to and at the time of his marriage with said Mary Schleuter, his present wife, fully cognizant of said facts above recited, and well knew that said Mary Schleuter was a lewd and immoral woman."

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Appellant insists that the allegations of the application were not sufficient to entitle appellees to a writ of *habeas corpus*, for the reason that it is "the statutory and common law right of the father to have the custody of his child," and that the court therefore erred in overruling his motion to quash such writ.

Section 2682, Burns' R. S. 1894 (2518, R. S. 1881), provides that the guardian of an infant shall have the custody and tuition of such minor and the management of the minor's estate, "Provided, that the father of such minor (or if there be no father, the mother, if suitable persons respectively) shall have the custody of the person and the control of the education of such minor." In a general sense a father is entitled to the custody of his minor child; this is not on account of any absolute right of the father to such custody, but because the law presumes that it is to the interest of such child to be under the care of its natural protector for maintenance and education. In a controversy for the custody of a child, whether between the father and mother, or between them or either of them and third persons, the welfare of the child is paramount to the claims of either parent, and the order of the court should in all such cases be made with regard alone to the best interests of the child. *Jones v. Darnall*, 103 Ind. 569, 572, 574, and cases cited, 53 Am. Rep. 545; *Joab v. Sheets*, 99 Ind. 328; *Bryan v. Lyon*, 104 Ind. 227, 54 Am. Rep. 309; *McGlennan v. Margowski*, *supra*, p. 156; *Hussey v. Whiting*, 145 Ind. 580, 582 and cases cited.

In determining whether the court erred in overruling appellant's motion to quash the writ of *habeas corpus*, the allegations of the application are admitted to be true, the same as in case of a demurrer to a pleading. Taking said allegations to be true, the court properly granted the writ of *habeas corpus*.

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On the hearing of said cause it was the duty of the court to make such order concerning the custody and control of said child as its best interests demanded.

The court did not err, therefore, in overruling appellant's motion to quash the writ of *habeas corpus*.

Finding no available error, the judgment is affirmed.

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IRVIN v. BUCKLES.

[No. 18,261. Filed October 5, 1897.]

148	386
149	486

**PARTITION.**—*Judgment.*—A decree of partition is *res adjudicata* that the parties thereto were co-tenants in the whole of the land involved in the decree, and estops them from denying such co-tenancy. *p. 397.*

**SAME.**—*Real Estate Included by Mistake.*—*Judgment.*—*Collateral Attack.*—A widow was the owner of forty acres of land by reason of the fact that she and her husband at the time of his death held the same as tenants by entireties. She also owned the undivided one-third interest in the remaining real estate of which her husband died seized. Being ignorant of the fact that at the death of her husband she became the owner in fee simple of the forty acres held by entireties, said tract was included in the real estate described in the petition for partition, and alleged to be owned by plaintiff and defendants as tenants in common. The court found as alleged in the petition, and the widow's statutory one-third was set off out of the other real estate, and the forty acres was included in the part set off to the defendants. When the widow learned of her mistake as to her legal rights she brought suit to quiet her title in the forty-acre tract. *Held*, that she could not thus collaterally attack the decree in partition. *pp. 390-400.*

From the Whitley Circuit Court. *Affirmed.*

*T. R. Marshall, W. F. McNaghy and P. H. Clugston,*  
for appellant.

*Andrew A. Adams,* for appellee.

**MCCABE, C. J.**—The appellee sued the appellant to quiet her alleged title in and to forty acres of land in Whitley county.

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The issues were tried by the court, resulting in a special finding of the facts, upon which the court stated conclusions of law favorable to the plaintiff, and rendered judgment accordingly.

The conclusions of law are assigned for error. The other errors assigned raise the same question involved in the conclusions of law.

The material facts found are, that in 1876 the land in controversy, by deed of general warranty, was by its owner conveyed to Wayne Scott and wife; that said Wayne Scott died in the year 1881 or 1882 seized of said land with his said wife, leaving surviving him the defendant, his said wife Amanda J., his widow, and Earnest Scott, Austin Scott, Jennie Scott, now Jennie Buckles, the plaintiff, and Nellie Scott, his children and only heirs at law.

That in April, 1883, the defendant filed her petition in the Whitley Circuit Court for partition of the lands of which her husband died seized, making all of said children parties defendant to said suit as his only heirs at law. In said petition she averred that said Wayne Scott died seized of 220 acres of land in the counties of Whitley and Noble and which included and embraced the forty acres now in controversy.

That defendant averred in her said petition that she was the owner in fee simple of the undivided one-third, including the forty acres now in controversy, and that her four children above named who were defendants in said partition suit were the owners in fee simple of the undivided two-thirds thereof, and that they held the same by descent from Wayne Scott as tenants in common.

The defendants in said partition suit being infants, were served with process, and a guardian *ad litem* was appointed for them by the court, and he filed an answer of denial. The court found the allegations of the peti-



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tion to be true, that the plaintiff and defendants therein were the owners in fee simple, and tenants in common of the real estate described in the partition complaint, which included the forty acres now in controversy.

The commissioners appointed by the court to make partition met and reported in accordance with the order to them directed, setting off to the plaintiff therein, Amanda J. Scott, as her full interest in said real estate described in the petition, sixty acres of land upon which were the buildings, and set off to the defendants therein, together, one hundred and sixty acres, which included the forty-acre tract now in controversy, which was confirmed by said court at the May term thereof for 1883, and judgment was rendered accordingly.

That immediately after said judgment of partition, said Amanda J. Scott entered into possession and control of the part so set off to her, and has ever since continued to use and occupy the same.

And the defendants therein, also, likewise, entered into the possession and continued to hold the portion set off to them as tenants in common until the month of February, 1893.

That afterwards, in 1893, Jennie J. Buckles, formerly Jennie J. Scott, her husband joining, filed her petition in partition of the real estate so set off to her and her brothers and sisters in the Whitley Circuit Court; that such proceedings were thereupon had as that partition of said land was awarded between said four children, setting off to the plaintiff, Jennie J. Buckles, as her full interest therein among others the forty-acre tract now in controversy. And, thereupon, she took exclusive possession of said forty-acre tract and has ever since continued to exercise acts of ownership over the same.

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That in the year 1883, soon after the determination of her partition suit, the defendant herein intermarried with one Hamer Irvin, whose wife she still is; that she is now asserting that she is the owner of said forty-acre tract, now in controversy by virtue of the deed conveying it to her husband and herself as tenants by entireties.

That at the time she brought her said partition suit she was the owner in fee simple of the forty-acre tract in controversy, and the defendants in said suit, her infant children, had no interest therein; that she did not assert her said title in said suit because she was ignorant of her rights, and not from any fraudulent or improper design on her part; that the defendant herein has never conveyed her title in said lands, nor otherwise parted with the same, unless said title has been divested by reason of the facts above set out.

There is no controversy that the conveyance to Wayne Scott and wife vested in them the title in fee simple as tenants by entireties of the forty acres in controversy, and that on the death of one of the tenants the survivor takes the whole estate, and that, in consequence, on the death of Wayne Scott, his widow, by reason of her survivorship, took the whole estate in the forty acres in question in fee simple, and that she thus owned it at the time she brought her suit for partition; but the question, and the sole question is, did the partition suit have the effect to divest that title? If it did not, the conclusions of law are wrong; if it did, they are right.

Appellant's learned counsel contend with earnestness, that a judgment in partition does not settle any question of title, unless the title is put in issue by an appropriate pleading, and there having been no such pleading in said partition suit, the partition decree does not conclude her, nor prevent her from asserting

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her title. It is contended that it appears that the manifest object of appellant's partition suit was solely to secure a division of the land, and an allotment of shares; and that where nothing more than partition is sought, no question of title is settled, and that it gives no new title to the parts allotted. In support of this proposition are cited, *Haskett v. Maxey*, 134 Ind. 182; *Luntz v. Greve*, 102 Ind. 173; *Miller v. Noble*, 86 Ind. 527; *Avery v. Akins*, 74 Ind. 283; *Thorpe v. Hanes*, 107 Ind. 324; *Utterback v. Terhune*, 75 Ind. 363; *Stephenson v. Boody*, 139 Ind. 60.

These cases, with many others decided by this court that might be cited, are cases where it was held that there was no pleading presenting for adjudication any question of title, and for that reason in each case it was held that the decree in partition did not conclude the parties as to the question of title. All of the cases recognize that the question of title may be presented in such a suit by appropriate pleadings, and that the decree thereon will conclude the parties as to the questions of title thus put in issue.

All of the cases above referred to were cases where the parties were tenants in common in fact. And most of them are cases where the tenant whose title was afterwards sought to be treated as settled by the decree, are cases where the tenant was a childless second wife, and it was alleged and adjudged that she held a life estate in the land only, whereas her interest was in fee simple. But whether her title was a fee simple or a life estate, she was in every case a tenant in common with the children and other heirs of her husband.

The only difference in the two kinds of title being in one case, the fee descends to the other heirs at the same instant that the life estate would attach, and in the other, title did not vest in the other heirs until the

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death of the wife. The other class of cases included in the citation above, is such as where a widow holding real estate by virtue of a previous marriage, marries again and during such second or subsequent marriage such real estate is sold on a judgment against her, recovered during her second marriage. In such a case it is held that such a sale only vests in the purchaser an estate in the land during the life of such remarried widow. And though the purchaser supposed the title so purchased by him to be in fee simple, yet his pleadings in his partition suit being "such \* \* \* as are ordinarily employed in partition proceedings and only such an assertion of title as was sufficient to entitle appellant to partition," the decree or judgment of partition is held not to conclude the parties thereto as to the question of title. *Miller v. Noble, supra*. In all of the cases in both classes it is held, that while the decree may conclude the parties as to title existing at the time of partition, yet it is not, and cannot be as to after acquired or after accruing titles. That is, where the judgment sets off to the childless second wife or widow one-third for life only, instead of the undivided one-third of her deceased husband's real estate in fee simple, that operates and affects only existing titles. It is true she holds a life estate in the one-third, and she holds more, she holds a fee simple in the same third, and the children of the previous marriage being parties to the partition suit have no interest whatever in that third at the date of the decree, but at her death they will have an interest. They will inherit it in fee simple from her. Therefore, it may well be held that an ordinary partition decree cannot operate upon that title, unless the pleadings specially put that title in issue and it is adjudicated in the judgment. *Thorp v. Hanes, supra*.

And the same is true in the other class of cases al-

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ready spoken of. While the doctrine already stated, namely, that an ordinary judgment of partition does not settle or conclude any question of title to the land parted, unless such title is put in issue by the pleadings, yet a consciousness seems to have been expressed in some of the cases that the doctrine has been carried to its utmost limits, and that cases might arise in which a qualification of, or exception to the general rule should prevail.

In *Crane v. Kimmer*, 77 Ind. at page 219, it is said: "The remaining question to be decided is, was the title to the land in controversy in issue in the partition proceedings, so as to be *res adjudicata* upon that question? In all cases of partition, the rights and titles of the parties are required to be set forth in the petition. 2 R. S. 1876, p. 344, section 2. This technically puts in issue the title to the land asked to be divided. and, by an answer in denial or otherwise, the title may be put in issue, and be adjudicated. \* \* \* The decree in a partition suit, however erroneous, if the court had jurisdiction, cannot be attacked collaterally in a suit in ejectment."

In *Powers v. Nesbit*, 127 Ind. at pp. 498, 499, this court said: "It is well settled that the title to real estate is not ordinarily in issue in proceedings for partition. *Davis v. Lennen*, 125 Ind. 185, and cases cited. Whatever else may be said of the soundness of many of these decisions, it must be said that it is our duty to adhere to them, as the rule they declare has become a rule of property. But, while the rule stated is a settled one, it is equally well settled that title may be put in issue in partition proceedings. *Isbell v. Stewart*, 125 Ind. 112; *McMahan v. Newcomer*, 82 Ind. 565, and cases cited; *Luntz v. Greve*, 102 Ind. 173; *Thorp v. Hanes*, 107 Ind. 324; *Spencer v. McGonagle*, 107 Ind. 410; *Woolery v. Grayson*, 110 Ind. 149; *Watson v.*

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*Camper*, 119 Ind. 60; *L'Hommedieu v. Cincinnati, etc., R. W. Co.*, 120 Ind. 435. It seems quite clear that the complaint asserts title, for it not only alleges that the appellees are the owners in fee, but it also specifically states facts showing that such is the nature of their title. This was certainly an assertion of title and a challenge to the appellant to join issue upon that question. \* \* \* The appellant accepted the issue tendered, and the court decreed that the appellees were the owners in fee, so that there was an issue as to the title and an adjudication upon that issue." It was therefore held that the motion for a new trial as of right ought to have prevailed.

In this connection it may be again observed that no person under our statute can have a standing in court to obtain partition of lands, unless he holds the lands as joint tenant or tenant in common with some other person or persons. Section 1200, Burns' R. S. 1894 (1186, R. S. 1881). And it is further provided, that he must set forth in his petition a description of the premises and the rights and titles of the parties interested. Section 1201, Burns' R. S. 1894 (1187, R. S. 1881).

This court has disapproved of a part at least of the above quotation from *Crane v. Kimmer*, in *Miller v. Noble, supra*, where on pages 529 and 530, it is said: "The appellant presses upon our consideration the case of *Crane v. Kimmer*, 77 Ind. 215, and there are some expressions in the opinion which seem to sustain his theory of the law. In so far as the expressions found in that opinion are in conflict with the cases we have cited, they must be deemed to be incorrect statements of the law. The point decided in that case was, that it was not error to admit in evidence the record of the partition proceedings, and that decision is right; but what is said about the title being put in issue and adjudicated in ordinary partition pro-

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ceedings is wrong. That title may be put in issue, tried and settled in partition proceedings is true. \*

\* \* It is not, however, correct to say that it is necessarily in issue in ordinary partition proceedings, where there are no other pleadings than such as are ordinarily employed, and no other decree than the usual one directing partition. \* \* \* In ordinary partition proceedings, it is only necessary to allege and prove such a title as entitles the party to a division of the land. The adjudication in such a case goes no farther than to declare that such a right is shown as will support partition and to allot the shares to the co-tenants entitled to them."

In *Habig v. Dodge*, 127 Ind. at page 37, it is said: "Where the only issue presented by the pleadings is whether or not there ought to be partition of the land among the several alleged owners, according to their respective interests, the title to the land is not in issue. A decree taken upon issues thus made is conclusive as an estoppel, so far as to settle and bind the present interest of all those who are parties according to the terms of the decree, but it does not operate upon or affect, or estop parties from setting up after-acquired titles."

From these authorities it is quite clear that while a decree in an ordinary partition proceeding does not conclusively settle any question of title, yet, it is equally clear from them, that some things are conclusively settled and put at rest by the decree. *Wright v. Nipple*, 92 Ind. 310; *Fleenor v. Driskill*, 97 Ind. 27. One is, the fact of partition itself, where the court has jurisdiction over the parties and subject. The decree is *res adjudicata* as between such parties, and is a bar to another partition proceeding between the same parties for the same land. It is also conclusive as to the proportion owned by each of the co-tenants. None of

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them can afterwards say or maintain that he owned a greater proportion, or a greater undivided interest than that which is adjudged by the decree, however, true such claim may be; because the decree like all other decrees or judgments imports absolute verity as to every fact essential to its existence.

The fact that the parties to such decree were co-tenants, that is either joint tenants or tenants in common in the land according as is alleged in the petition and adjudged in the decree, it would seem is equally essential to the existence of the decree, and if so it is conclusively settled by it.

It is to be observed that none of our cases decide this question. There is no case we have been able to find in our decisions where the petition for partition embraced lands belonging exclusively to one of the parties, or to the petitioner, and as was the case here, alleged to belong to them all as tenants in common and the decree of partition rendered accordingly.

But the above quotations from our cases indicate that this court would have decided that a decree of partition is *res adjudicata* that the parties thereto were co-tenants in the whole of the land involved in the decree, and estops them from denying such co-tenancy.

This, however, is the first time that the question has been directly presented to this court for decision.

The whole doctrine upon the question is forcibly stated in Freeman on Co-Tenancy and Partition, section 530, thus: "But if a judgment in partition is not conclusive upon the title of the parties, this is only because the title was not according to the law of the state where the partition was made, within the issues made or tendered in the action. The rule that a judgment is conclusive upon all the issues determined by it, is not less



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applicable to judgments in partition than to the judgments in any other form or kind of action. One of the issues which such a judgment ordinarily determines is, that the parties were in possession of the property, holding it as co-tenants. Hence, a party to a partition suit is estopped from showing that at the time of the partition he was holding any part of the premises in severalty adversely to his co-tenants, or that the petitioner had no interest in the property."

A portion of this section of Freeman on Co-Tenancy and Partition was quoted and adopted by this court as a correct statement of the law in *Isbell v. Stewart, Admr.*, 125 Ind. 112.

The fact found that the widow was mistaken in her legal rights in the forty-acre tract now in controversy does not help her case any.

So long as the decree stands it must be held to import absolute verity.

We need not and do not decide what effect, if any, her mistake as to her legal rights in the forty-acre tract would have had in an application to set aside the decree on account of said mistake. It is sufficient to say that until it is set aside it must conclude the parties to it as to that matter.

To permit her to collaterally impeach the decree and thereby restore to her what she lost by her mistake for which the other parties to it are in nowise to blame, would operate as a complete destruction of certain rights the other parties had in that part of the lands of which it is confessed they were actually owners in fee and tenants in common with her; and such impeachment of the decree would not only restore to her all she had lost by her mistake, but it would bestow on her the rights thus taken from the other parties. In other words, it would enable her to profit by her own mistake, by her own negligence to

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the loss of the other parties who are not chargeable with any mistake or negligence. She put forty acres of land into the common property of which she now asserts she was sole owner in fee simple. She thus increased the size of the allotments to be set apart to each of the co-tenants including her own allotment.

Her allotment as the finding shows was made up entirely of lands in which all the parties were co-tenants before the partition. She got, therefore, in her allotment an amount equal to the averaged value of one-third of forty acres more of the common estate than she would have been legally entitled to if she had made no mistake and had not put the forty acres into the common estate. She now proposes to take away the forty acres from the appellee to whom it was set apart as a part of her allotment, without any offer to restore what she got by means of her mistake off of the other tenants in common, more than she was legally entitled to before the decree. This circumstance alone ought to be sufficient to estop her from collaterally impeaching the decree as she is proposing to do.

This feature of the case is somewhat analogous to the principle decided in *Wiseman v. Macy*, 20 Ind. 239, 83 Am. Dec. 316. In that case Barbara Wiseman was the widow of Jacob Wiseman who died in 1851 seized of certain real estate in Indianapolis, leaving his only child Margaret Wiseman and said widow as his sole heirs. Said widow by the statute in force was entitled to dower in said real estate.

She as the legally appointed guardian for her said child, on petition, secured an order of the probate court to sell said real estate, and sold it without making any mention of her dower interest.

She afterwards sought to have her dower therein set off to her, and it was held that she was estopped from setting up such claim by her sale as guardian.

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We therefore conclude, both on principle and authority, that the appellant cannot be heard to collaterally impeach the decree, and is estopped thereby from showing that at the time thereof she was holding any part of the premises in severalty adverse to her co-tenants. Hence, the trial court did not err in its conclusions of law. The judgment is affirmed.

## CRUM ET AL. v. THE STATE.

[No. 18,285. Filed October 5, 1897.]

**CRIMINAL LAW.—Larceny.—Obtaining Money by Trick or Deception.—**

One who obtains from another the possession of money, representing that he has an agency through which he can obtain five dollars for one which would pass anywhere, and agrees to make such person his partner in the scheme and either return the money so obtained or give to him such counterfeit money of five times the amount obtained, and immediately appropriates the money to his own use, without any intention either to return it or give the counterfeit money, is guilty of larceny, and not of obtaining money by false pretenses. *pp.* 406-408.

**INSTRUCTIONS.—When Instruction is Incomplete.—Practice.—**Error cannot be predicated on the giving of an incomplete instruction where an additional or more definite instruction was not requested by the complaining party. *p.* 408.

**CRIMINAL LAW.—Disfranchisement.—Larceny.—Infamous Crime.—Statute Construed.—**The crime of larceny is an infamous crime within the meaning of section 8, article 2, of the state constitution, and disfranchisement for any determinate period may be imposed as part of the punishment for one convicted of such crime under the provision of section 2006, Burns' R. S. 1894 (1933, R. S. 1881). *pp.* 408-411.

**EVIDENCE.—Proof of Commission of Other Like Offenses.—Criminal Law.—Larceny.—**Evidence of other similar offenses committed about the same time as the crime for which defendant is on trial is admissible in a prosecution for larceny by obtaining possession of money under promise to return it in a few days or give five times the amount in counterfeit money which could not be detected, without any intention either to return the money obtained or give the counterfeit money. *Story v. State*, 86 Ind. 208, in so far as in conflict with this holding is overruled. *pp.* 411-413.

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From the Grant Circuit Court. *Affirmed.*

*Austin DeWolf* and *H. J. Paulus*, for appellants.

*W. A. Ketcham*, Attorney-General, and *Elias Bundy*, for State.

HOWARD, J.—The appellants, John W. Crum and John C. Evans, were convicted of grand larceny, and ask for a reversal of the judgment against them, claiming, first, that the evidence was insufficient. The evidence was chiefly that of the prosecuting witness, which was corroborated by that of other witnesses.

It appears that Evans was president of a bank in Jonesboro, and Crum was an insurance agent in Marion. The prosecuting witness was a farmer named Haines living near Marion, and was related by marriage to Evans. On August 22, 1896, Evans and his wife called to pay a visit to Haines, who lived with his mother. Evans and his wife stayed all night. During the evening Mrs. Evans spoke quite freely of how well her husband had got along, that he was making money rapidly; and said that farming was a pretty slow business, and if one wished to make money fast he must do something else. The evidence of Haines, the prosecuting witness, then continues: "After the women folks had retired for the night, Evans hitched over his chair nearer mine and began to talk on the money question, said that he had a scheme on foot by which if he had the money he could go to New York City and get a large amount of good money, \* \* \* said that he could get five for one and that it was good money that would pass anywhere. \* \* \* Told about a friend he had there that made this offer to him." That his friend in New York "was connected with the Continental Insurance Company." That the insurance company "had a man here at Marion that

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would give the numbers that would pass him through that bank." The money "would come through the Continental Insurance Company's bank, in the back room, New York City." Evans wanted \$1,000.00 of the witness. This was on Saturday, and it was agreed that on the succeeding Saturday the witness was to meet Evans in Marion to continue the negotiations. Accordingly, Haines went to Marion as agreed. Did not at first meet with Evans, and went to Crum's office on some insurance business. He did not say anything to Crum about the proposed deal with Evans, as he did not then know that Crum was the man that Evans had referred to as the one through whose aid the money could be procured in New York; although he did know that Crum was the local agent for the Continental Insurance Company. Incidentally, however, he asked Crum if he knew where the witness "could get two for one;" to which Crum replied, "Yes, five for one." He also asked Crum if he had seen Evans; to which Crum answered, "No," to wait, that Evans would be in directly. Towards evening, and some time after leaving Crum, witness met Evans, and they started together for a retired place, out of town, called McClure's woods. On the way Crum fell in with them. After reaching the woods they began again on the money question. Evans showed witness good money, and gave him a five-dollar bill to take and try it. He spoke again of "the wonderful money in the east that he could get;" "that the Continental Insurance Bank had the money there to let at five for one." He said it would pass anywhere. Crum read a letter purporting to be from the Continental Insurance Company. The letter said that the money was there, that Crum had made a large amount of money for the company, and that "they wanted him to be wise." "'Come, friend Crum, and be wise,' is what it said." The witness

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agreed to try to raise the money requested of him, and they separated, returning by different roads to the town. A few days after, Crum and Evans came to him at the farm to see if he had the money, and he told them he yet lacked something over two hundred dollars. They urged him to hurry the matter, that "we had to make the deal right away if we made it at all." The next day witness went to Marion and met Evans, telling him he had the money, \$1,000.00, in checks and certificates of deposit. Evans, however, told him to go to the bank and get the cash, which he did, and they repaired at once to McClure's woods, where they found Crum, and the money was counted out and given to Evans. They first suggested that witness go to New York and get the counterfeit money, and on his refusing, Evans said he would take the first train and go himself. Crum said there would be no trouble in getting the money, "that he would give the numbers that would pass Evans through." Crum wrote a check on Evans' bank for \$10,000.00 as his share in the enterprise. Evans looked at the check and pronounced it good, saying that Crum had deposited that much money a few days before. Evans then said he would need more money, and he wrote a note for \$4,000.00, which witness signed. Evans said he would indorse it and draw the money on it, and would see that the note was paid out of the money they should receive from New York. When Crum offered his \$10,000.00 check, Evans at first objected, saying there were but two in the deal, himself and witness, but Crum insisted that he must be a partner, and Evans yielded. Evans and witness together were to get \$50,000.00, or \$25,000.00 apiece. The bogus money was to be shipped by Evans to witness by express, and it was agreed that he should not open the package until they were all together. On the day appointed, witness went

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to the express office, and was told by the agent that there was a money package for him. He took the package home and put it in his trunk until the next day, when he took it out and carried it in a sack to an old house and there carefully buried it in a pile of oats which he had upstairs. That evening Evans and Crum came along and inquired if he had received the package, and then told him to bring it to a piece of woods about half a mile away. Crum cut the cords and unwrapped the package, and then asked Evans if the box looked as it did when he nailed it up. Evans said the nails were larger in one of the lids than when he nailed it up. The lid was then pried off, and nothing but bunches of paper were found in the box. Evans then said it was not the way that he had left it, that he had counted the money, placed it in the box and then nailed it up. He said if they told about this they "would all go to the penitentiary." He then flew into a passion, exclaimed that he had been robbed, that Crum and witness had robbed him and that he would kill them both. With that he drew a revolver and pointed it at witness; but Crum interferred and kept him from shooting. Crum grabbed Evans and they had a terrible scuffle, during which witness, in great fright, "took to his heels and ran through the woods." After that Crum called to witness to come back, that he had secured Evans' revolver, holding it up so that witness could see it. Witness went back and found that Evans had gone. Crum said he had struck him and Evans had then run off. He said he would find out whether Evans ever sent the money; that he had been robbed of \$10,000.00, and that witness had not done it. He said, also, that witness had best not say anything about the matter, as they were all liable to be sent to state's prison for twenty-two or twenty-three years. Crum then picked up the box and all the

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paper and wrappings and took them to his buggy and drove off, while witness went home.

Other evidence goes to show Crum's full participation in the scheme, and that both appellants conspired to deprive Haines of his money, without any purpose on their part of even giving him the counterfeit money they pretended to be able to get. It was all a detailed contrivance to play on the cupidity and simplicity of Haines and thus obtain his money and at once appropriate it to their own use.

Counsel endeavor to argue that the crime committed was that of obtaining money under false pretenses, and not larceny. The facts, however, show that Haines parted with the possession only, and not with the title to his money; it was to be returned to him in thirty days at the farthest, or five to one should be given him for it in the New York money. They did neither. Larceny may be committed not only by taking property from another without his knowledge, but also by a trick, by means of which the owner's property is taken by some false token or other deception. If there is a present purpose to obtain possession of the property of another by such deception, and to at once appropriate the property to the use of the wrongdoer, there is larceny. Indeed, in such a case, there is in reality a taking without the knowledge of the owner, for, by means of the trick or deception practiced, his knowledge is clouded, so that he loses possession of his property without realizing that it has been taken. But, in such a case, the title remains with him, so that the crime is larceny, and not obtaining property under false pretenses. In the latter case, both the possession and the title go to the wrongdoer; the owner freely parts with both, either for some worthless consideration, or because in some way he is persuaded to do so by false representations. Had ap-



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pellants, in this case, carried out their agreement and procured the counterfeit money by investing Haines' money in New York, it might be that he would thus have parted with the title, and the offense would have been that of obtaining money under false pretenses. But as it was, appellants had no intention to do as they agreed, but at once appropriated the money to their own use. This was larceny.

It has frequently been held that larceny may be committed by wrongfully obtaining possession of property by trick, as well as by securing it by stealth. See *Fleming v. State*, 136 Ind. 149; *March v. State*, 117 Ind. 547; *Grunson v. State*, 89 Ind. 533, 46 Am. Rep. 178, and authorities cited in those cases. In Gillett, *Crim. Law* (2d ed.), section 540, the rule in such cases is well stated as follows: "Where the defendant, with a preconcerted design to steal the property, obtains possession of it by fraud, the taking is larceny, for the reason that, as the fraud vitiated the transaction and left the title in the original owner, he still retained a constructive possession of the goods, and the conversion of them by the defendant is such a trespass to that possession as makes larceny." Other authorities showing that larceny may be committed by trick or deception are: *Huber v. State*, 57 Ind. 341, 26 Am. Rep. 57; *Loomis v. People*, 67 N. Y. 322, 23 Am. Rep. 123; *People v. Rac*, 66 Cal. 423, 6 Pac. 1, 56 Am. Rep. 102; *People v. Shaw*, 57 Mich. 403, 24 N. W. 121, 58 Am. Rep. 372; *United States v. Murphy*, 48 Am. Rep. 754; *Soltau v. Gerdau*, 119 N. Y. 380, 23 N. E. 864, 16 Am. St. 843. It is true, that where there is a contract for the loan of money, or where money is otherwise voluntarily paid to another, on account of some misrepresentation, the crime may be that of obtaining money under false pretenses, and not larceny. Such cases were: *Perkins v. State*, 65 Ind. 317, and *Kellogg v. State*,

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26 Ohio St. 15, cited by appellants. Those cases are not here in point. Here, the money was obtained under an agreement to purchase certain pretended other money, without any design on the part of the conspirators to make any such purchase, but with the intention of appropriating the money to their own use.

A part of instruction No. 6, given by the court, is objected to. It was as follows: "Larceny, however, may exist although the possession of the alleged stolen goods is obtained with the consent of the owner, if that consent is procured by deception and with the intent not to return the same, but to appropriate the same and deprive the owner thereof and of the remedy for their loss." Counsel do not deny that this instruction is correct, so far as it goes, but they say that there should have been added to the conditions stated the further condition of "a felonious intent to steal and appropriate the property to taker's use." It may be questioned whether the felonious intent to appropriate the property to the taker's use is not sufficiently expressed in the instruction as given; but however that may be, the instruction as given is correct, and if counsel desired additional or more definite instruction on this point they should have asked for it.

In instruction No. 12, given by the court, the jury, in conformity with the provisions of the statute, section 2006, Burns' R. S. 1894 (1933, R. S. 1881), were told that if they found the defendants guilty as charged, it would be their duty to inflict as a part of the punishment "disfranchisement for any determinate period." Appellants contend that this was error, for the reason that larceny is not an infamous crime, and as the constitution, article 2, section 8, provides that, "The General Assembly shall have power to deprive of the right of suffrage, and to render ineligible any person convicted of an infamous crime," therefore,

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the statute above cited, in so far as it authorizes disfranchisement in case of conviction for larceny, is unconstitutional. The constitution does not declare what crimes are infamous; neither has the statute made any provision on the subject, unless it might be said that the legislature, in enacting the statute above cited and other statutes which prescribe disfranchisement as a part of the punishment of a given crime, has thereby, in effect, declared such crime to be infamous. However that may be, we are of opinion that larceny, being a felony, is an infamous crime, and was so understood to be in the adoption of the constitutional provision referred to.

In 1 Wharton Crim. Law (10th ed.), section 22a, it is said: "At common law, 'infamy' was held to attach to all crimes, a conviction of which impressed such a moral taint on the perpetrator as was supposed to require his incapacitation as a witness and the suppression of his political rights. Infamy, in this sense, includes treason, felony, and the *crimen falsi*; and a conspiracy to commit an infamous offense partakes of the character of the offense at which it is aimed."

In Black's Law Dictionary at page 618 it is said that "A crime punishable in the state prison or penitentiary, with or without hard labor, is an infamous crime, within the provision of the fifth amendment of the constitution [of the United States] that 'no person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury.'" Citing *Mackin v. United States*, 117 U. S. 348, 6 Sup. Ct. 777. And see *Ex parte Wilson*, 114 U. S. 417, 5 Sup. Ct. 935. The same rule holds in New York, as said in the same connection, by Mr. Black, citing 2 Rev. St. (p. 702, section 31), p. 587, section 32.

In 4 Am. and Eng. Ency. of Law, 644, it is said, that

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"A crime punishable by imprisonment in the state prison is an infamous crime." And on page 646 of the same authority, larceny is named as one of the offenses which have been held to be infamous. In 10 Am. and Eng. Ency. of Law, 605, it is added, in note, that even petit larceny is infamous at common law.

In 1 Bishop Crim. Law (7th ed.), section 974, the author says that larceny is an infamous crime, "because it is a felony." So, also, he says, "is the knowingly receiving of stolen goods; and so, at the common law, is even petit larceny."

It is true that in *Glenn v. Clore*, 42 Ind. 60, citing *Pruitt v. Miller*, 3 Ind. 16, it was said that "Not all felonies render the perpetrator of them infamous." But the statement in *Pruitt v. Miller*, *supra*, was based upon a statute under the old constitution, R. S. 1843, p. 999, section 79, and p. 719, section 261. Those decisions, moreover, had relation to the competency of witnesses, as affected by such crimes. The legislature, however, has power at all times to regulate the competency of witnesses; and has, in fact, made almost all persons competent, except the insane, children lacking capacity, and certain persons having confidential relations with either of the parties, sections 504, 505, 514, 1867, Burns' R. S. 1894 (496, 497, 506, 1798, R. S. 1881). The decisions cited are, therefore, for several reasons, no longer, if ever, controlling in the matter here under consideration.

It is clear, then, as we think, particularly from the fact that at common law all felonies, including larceny, were infamous crimes, that the legislature had ample authority under the constitutional provision cited, to provide "disfranchisement for any determinate period" as a part of the punishment to be imposed for the crime of larceny; and, consequently, that the court did not err in so instructing the jury.

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Further complaint is made that the court erred in refusing numerous instructions asked by appellants, and also in giving certain instructions asked by the State. We are of the opinion, however, that the questions thus raised have been fully considered in passing upon the sufficiency of the evidence to sustain the verdict. The evidence, as we have seen, plainly shows the commission of larceny in obtaining possession of the prosecuting witness' money by elaborate and detailed deception and trickery. There was no loan of money; neither was the crime committed other than that charged in the indictment.

Appellants complain, finally, that the court erred in the admission of evidence of other like crimes committed by them about the time of committing the crime here charged. This evidence was quite proper in order to show the intention with which the acts charged as criminal were committed. The appellants were not tried or punished for the other offenses committed; but by the evidence given of such like transactions by them about the same time the jury were the better able to apply the evidence given as to the offense charged. Appellants' own counsel have themselves tried hard to show that the acts charged in the indictment were not criminal, or, even if criminal, that the crime was other than that for which they were indicted. In such equivocal cases it is proper to show the nature of the offense charged, and also the intention with which it was committed by referring to other like acts committed by the same persons. The evidence objected to showed that appellants were expert and unscrupulous confidence men, engaged in the business of fleecing the unwary, by stealing their money under pretense of giving them "other money, five to one, just as good."

As said in 1 Bishop Crim. Law (7th ed.), section

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1065: "Cases are numerous in which proof of one crime is received to establish another." So in Gillett's Indirect and Col. Ev., section 68, it is said: "The weight of authority favors the view, however, that where the direct evidence shows that an act was done or omitted, it is competent to prove that a custom existed prior to that time to do or not to do such act, as such evidence legitimately tends to uphold the theory of one of the contending parties."

In 3 Rice Ev., section 155, citing American and English authorities, it is said: "Although evidence offered in support of an indictment for felony be proof of another felony, that circumstance does not render it inadmissible. If the evidence offered tends to prove a material fact, it is admissible, although it may also tend to prove the commission of another distinct and separate offense." And it is there added that, "The principle is, that all the evidence admitted must be pertinent to the point in issue; but if it be pertinent to this point, and tends to prove the crime alleged, it is not to be rejected, though it also tends to prove the commission of other crimes, or to establish collateral facts."

It is true that such evidence of similar offenses is more frequently received in cases of forgery and counterfeiting than in any others. This, however, is only because in such cases the commission of other like acts tends more frequently to show the intent with which the act charged was done. In principle there can be no reason why in any case the intent with which an act was done may not be proved by competent and pertinent evidence, even though proof may thus incidentally be made of other offenses. See, also, the able dissenting opinion of Elliott, J., in *Strong v. State*, 86 Ind. 208, which we think correctly expresses the law on this question. The decision of the court in

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that case, in so far as concerns the question here considered, is therefore overruled.

There can be no doubt that this case was fairly tried. No more detestable crime could be committed against the good order of society. The acts done by appellants made up a combination of cheating, lying, stealing, and breach of confidence, tending to make all honest, simple-minded people suspect every polite stranger they meet with, and even to distrust their own friends and neighbors. Such a crime against society should be most severely punished. That the president of a bank and an insurance agent should combine to impose upon a simple-minded, hard-working man, unfamiliar with the intricacies of business, but adds to the iniquity of the offense. The truth is that the three years or five years imprisonment to which appellants were respectively sentenced, was not an adequate punishment for their offense; and if a new trial should be awarded for any reason, and such reason could be a legal cause for a new trial, it would be only that the punishment might be increased. The fact that the credulous, simple-minded prosecuting witness was himself willing to aid in circulating counterfeit money, does not lessen the guilt of his tempters, any more than did the weakness of the denizens of Eden excuse the villainy of the arch fiend who corrupted them.

Judgment affirmed.

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THE WINDFALL MANUFACTURING COMPANY v.  
PATTERSON ET AL.

[No. 17,979. Filed May 12, 1897. Rehearing denied October 6, 1897.]

**NUISANCE.**—*When a Business Will be Enjoined as.*—A business which is a nuisance *per se*, as also one that is so conducted as to become an actual nuisance, will be enjoined; but a business which merely threatens to become a nuisance, will be enjoined only where the court is satisfied that the threatened nuisance is inevitable. *p. 418.*

**SAME.**—*Natural Gas.*—A gas well sunk to supply fuel for a manufacturing plant is not *per se* a nuisance. *p. 421.*

**NATURAL GAS.**—*Drilling Well Near Dwelling.*—*Injunction.*—The drilling of a gas well within 152 feet of a dwelling house will not be enjoined on account of the noise, pollution of the air, danger from fire or explosion that would result from operating the well, or on account of water or oil from the well, where it is not shown with certainty that water, oil, or gas will be found, and it is not shown that the gas well could not be operated in such a manner as to avoid the injuries apprehended. *pp. 422, 423.*

From the Howard Circuit Court. *Reversed.*

*J. C. Blacklidge, C. C. Shirley, R. B. Beauchamp, W. W. Mount and W. O. Dean, for appellant.*

*M. Bell, W. C. Purdum, Gifford & Nash and Gifford & Coleman, for appellees.*

HOWARD, J.—The appellees alleged in their complaint that the appellant was “threatening to and proceeding to drill a gas well” within 152 feet of appellees’ dwelling, and asked that the appellant be restrained from digging said well, and from digging any well, or laying pipes therefrom, “at any other point within 300 feet” of appellees’ property.

The complaint was in two paragraphs, to the first of which, named second in the record, there was a



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special paragraph of answer; and to this answer a demurrer was sustained. The cause was submitted to the court for trial, and judgment rendered enjoining the company from drilling the well. The rulings on the pleadings, and the overruling of the motion for a new trial are assigned as errors.

It is doubtful whether the evidence is in the record. There is a certificate by a reporter that the evidence was taken down by him in shorthand and then transcribed into the longhand writing to which he certifies. The clerk also certifies "that the evidence set out in the bill of exceptions is the same that was taken by John Ingels, who is the official court reporter of the Howard Circuit Court." We might, perhaps, presume that the reporter was sworn; but there is nothing to show that his transcript of the evidence was filed with the clerk before it was incorporated in the bill of exceptions, or, indeed, that it was ever so filed and incorporated. The questions, however, which might be considered in passing upon the motion for a new trial are, in a great measure, those raised upon the pleadings. The main facts do not seem to be in dispute.

It appears that the appellant company was organized in 1891, for the purpose of buying land and machinery to engage in the manufacture of brick and drain tile. In pursuance of this object, the company, during the same year, purchased twenty-two acres of land near the town of Windfall. The land was believed to contain an unlimited supply of natural gas, such as was needed to operate the business in which appellant was to engage. During the same year, at a cost of \$25,000.00, the company erected its plant and machinery, locating the same near the highway on the west line of said tract, and within 200 feet of the land afterwards purchased by appellees. In that year,

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also, the company drilled a gas well near the south-east corner of its land, and obtained a sufficient flow of gas to run its factory until the year 1895, when the gas failed in that well.

It is averred in the answer, that the twenty-two acre tract of land is not large enough to afford more than two sites for the location of a gas well, such as would probably furnish gas in sufficient quantity to operate the factory; that on the failure of the east well, it was necessary to suspend the operations of the factory until another well should be located and drilled; that three years after the location of the plant, the appellees, with full knowledge of all the facts, purchased the land on which they erected the dwelling house in question; that in 1895, on the failure of appellant's first well, and while appellant was prospecting for the location of a second well, the appellee, William E. Patterson, gave his consent that a well might be sunk on the west side of appellant's land, not to be nearer than 150 feet to appellees' said dwelling; and that appellant, relying upon this agreement, proceeded to drill the well here in question, and to lay the gas mains therefrom; that after the company had been engaged for four days in sinking the well, and when they were about to begin drilling the rock, the restraining order was issued; and that the point selected for drilling the second well was the furthest possible from the first well, and the best that could be selected.

The reasons given in the complaint to show why the injunction should be issued were: That if the proposed well should be completed, there would be a continuous loud noise, depriving appellees of the enjoyment of their property and greatly depreciating its value; that natural gas is a very explosive and inflammable substance, and when confined under the surface of the earth, permeates the soil for hundreds of feet;

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and, as soon as freed in the air, produces a stench, tarnishes paint, furniture and silverware, and renders the atmosphere unfit to breathe for many feet around the place of such escape; that the pipe line, if constructed to carry gas at rock pressure, as intended, would endanger the lives and property of appellees and their families; that gas wells attract the electric fluid and are exceedingly liable to be struck by lightning; that in the digging of said well there is danger of bringing from the earth other substances, such as water and oil; and that, if the well should overflow with either oil or water, great damage would result, rendering appellees' property unfit for the purposes for which they hold the same.

The dangers thus apprehended by appellees were such as might arise in case the well should be sunk, and gas, oil or water be found. It is not said that any evil result could come merely from the drilling of the well. But the well might be sunk into the trenton rock, and yet no gas, oil or water be brought to the surface. It is not clear, therefore, that the danger apprehended is so imminent as to warrant the issue of a restraining order. In addition, it may be questioned whether an injunction should in any event issue, unless it be true that a gas, oil, or water well is a nuisance *per se*, or unless it should be made to appear that the well and pipes of appellant were to be improperly put down and afterwards carelessly attended to.

In *Dalton v. Cleveland, etc., R. W. Co.*, 144 Ind. 121, the appellant sought to enjoin the erection on appellee's right of way of a coal chute, to be used for supplying its engines with coal, and to be situated very near to a building owned and used by appellant as a dwelling and business house. It was alleged that from the height and character of the structure it would

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greatly interfere with appellant's access, view, light and air, would cause unusual, loud and offensive noises, disturb sleep, cause coal dust, fumes of sulphur and other noisome gases to be blown into appellant's building, injuring furniture, stock in trade, and in other ways greatly impairing the value of appellant's property and causing annoyance, discomfort and danger to appellant and to the occupants of his building. The court, in that case, while not denying that unlawful uses of the structure might be restrained, yet held that, as the erection of the building would of itself not constitute a nuisance, a writ could not issue, for the reason that the threatened evils might never result. The case of *Keiser v. Lovett*, 85 Ind. 240, and other authorities were there cited, and the court concluded that: "Each of these cases recognizes the rule that equity will not restrain that which is not a nuisance upon the claim that it may be so used as to constitute a nuisance."

A business which is a nuisance *per se*, as also one that is so conducted as to have become an actual nuisance, will be enjoined. But a business which merely threatens to become a nuisance will be enjoined only where the court is satisfied that the threatened nuisance is inevitable; and, since the remedy is so severe, resulting often in wholly depriving an owner of the use of his property, the court will proceed with the utmost caution in restraining such threatened and possible injuries.

It was said in *Duncan v. Hayes*, 22 N. J. Eq. 25, that "A court of equity will not restrain, by injunction, any lawful business, or the erection of any building or works for such business, because it is supposed or alleged that such business will be a nuisance to a dwelling house near it; it must be clear that the business will be a nuisance, and that it cannot be carried on so as not to be such."

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And, in *McCutchen v. Blanton*, 59 Miss. 116, the court said: "Every doubt should be solved against the restraint of a proprietor in the use of his own property for a purpose seemingly lawful, and conducive both to individual gain and the general welfare. Relief by injunction is so severe in its consequences that it is not to be granted in such a case, except when the right to it is clearly and conclusively made out. To interfere with one's right to use his own land for the production of what he pleases, in a case of doubt, would be a flagrant abuse of power. It is not enough to show a probable and contingent injury, but it must be shown to be inevitable and undoubted." See, also, *Cleveland v. Citizens Gas Light Co.*, 20 N. J. Eq. 201; *Ryan v. Copes* (S. C. 11 Rich. Law, 217), 73 Am. Dec. 106 and note; *Doellner v. Tynan*, 38 How. Prac. (N. Y.), 176; *Rhodes v. Dunbar*, 57 Pa. St. 274, 98 Am. Dec. 221; *Huckenstine's Appeal*, 70 Pa. St. 102, 10 Am. Rep. 669; *Gilbert v. Showerman*, 23 Mich. 448; *Owen v. Phillips*, 73 Ind. 284; *Barnard v. Sherley*, 135 Ind. 547, 41 Am. St. 454, 24 L. R. A. 568.

In *Doellner v. Tynan*, *supra*, it was held that where a street in a city ceases to be used as a place of residence, and is changed to a place of business, no one or two persons, who may, for any reason, desire to continue their residence therein, should be allowed to prevent the carrying on of a lawful and useful trade, merely because they are or may be subjected to annoyance, or even loss thereby. And, in *Gilbert v. Showerman*, *supra*, the court refused to restrain the carrying on, in a proper manner, of a steam flouring mill in the business part of a city, notwithstanding the use of such building for that purpose caused annoyance to the complainant and his family, and rendered the occupation of his building, as a residence, less desirable than it otherwise would be. In that case, Judge

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Cooley said: "The most offensive trades are lawful, as well as the most wholesome and agreeable; and all that can be required of the men who shall engage in them is, that due regard shall be had to fitness of locality. They shall not carry them on in a part of the town occupied mainly for dwellings, nor, on the other hand, shall the occupant of a dwelling in a part of the town already appropriated to such trades, have a right to enjoin another coming in because of its offensive nature. Reason, and a just regard to the rights and interests of the public, require that in such case the enjoyments of pure air and agreeable surroundings for a home shall be sought in some other quarter; and a party cannot justly call upon the law to make that place suitable for his residence which was not so when he selected it."

In the case at bar, the appellant, in locating its brick and tile works, for which natural gas was to be used as fuel, selected a place retired from all residences, and there erected its plant and machinery at great expense. The business so commenced was continued for three years before the appellees came and erected their dwelling upon land across the highway from appellant's land and within 200 feet of its brick and tile works. Certainly, therefore, unless the works should constitute a nuisance *per se*, or unless they were so conducted as to become a nuisance in fact, the appellees are not in a position to demand that equity restrain the appellant in the use of its property.

A nuisance *per se*, as the term implies, is that which is a nuisance in itself, and which, therefore, cannot be so conducted or maintained as to be lawfully carried on or permitted to exist. Such a nuisance is a disorderly house, or an obstruction to a highway or to a navigable stream. But a business lawful in itself can not be a nuisance *per se*, although, because of sur-

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rounding places or circumstances, or because of the manner in which it is conducted, it may become a nuisance. Certain kinds of business or structures, as powder houses or nitroglycerine works, are so dangerous to human life that they may be maintained only in the most remote and secluded localities. Others, as slaughter houses and certain foul-smelling factories, are so offensive to the senses that they must be removed from the limits of cities and towns, and even from the near neighborhood of family residences. Yet there must be some proper place where every lawful business may be carried on, without danger of interference on the part of those who, in some slight degree, may be annoyed or endangered by the nearness of the objectionable occupation.

Of course all persons have the right to insist that a business in any degree offensive or dangerous to them shall be carried on with such improved means and appliances as experience and science may suggest or supply, and with such reasonable care as may prevent unnecessary inconvenience to them. By such care and improved methods and appliances, many occupations formerly regarded as nuisances may now be carried on, even in populous neighborhoods, without annoyance to any one. So, an establishment in some degree offensive, as a livery stable, may be kept so cleanly, so free from anything to offend the sense of sight or of smell, that the proprietor may invite his most fastidious visitors to any part of it; although the same establishment might also be so kept as to be an abomination even to the passer-by upon the highway.

It cannot be said that a plant for the manufacture of brick and drain tile, or even a gas well sunk to supply fuel for such a plant, is a nuisance *per se*. The business is lawful, and, if located in a proper place, and conducted and maintained in a proper manner,

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neither the plant nor the well can be treated as a nuisance.

Appellees voluntarily selected the neighborhood of appellant's plant for their residence, three years after the appellant began business there; and while this circumstance is not controlling, yet it is one that must be taken into consideration. Nor will it be sufficient answer that appellant's gas well was on the east side of the brick yard at the time the appellees selected their home on a lot within 200 feet of the factory. Experience has shown that gas wells are of short life, and that, after the failure of one well, another, in order to be successful, must be located at a considerable distance from the first. It is averred that there was room for but two wells on this twenty-two acre tract, and that the location of the proposed well is the farthest possible from the first well and the best that could be selected. It is, besides, admitted by the demurrer to the answer that the appellee, Willard E. Patterson, agreed that the second well should be located within 150 feet of his house; and, while it is possible that such agreement might not bind his co-appellee, yet the circumstance shows that the appellant, in locating its well at the distance of 152 feet from appellees' dwelling, was proceeding carefully and with due regard to appellees' rights.

Unless, therefore, it should be made to appear that the gas well could not be so managed and maintained as not to be of more than slight or barely possible danger or annoyance to appellees, it does not seem that they could have any sufficient cause to ask that the sinking of the well be restrained. The record does not show, nor have we any means of knowing, that a well at a distance of 152 feet, or over nine rods, from a dwelling house, cannot be so maintained and cared for as not to cause the injury and annoyance claimed to be threatened to appellees in this case.



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It is to be remembered that before a court of equity will restrain a lawful work, from which merely threatened evils are apprehended, the court must be satisfied that the evils anticipated are imminent and certain to occur. An injunction will not issue to prevent supposed or barely possible injuries. In the case before us, it is not shown that even if the gas well were in operation it could not be so managed and cared for as to avoid all the injuries apprehended. But, more than this, there might never be any gas found in the well. This, the appellees practically concede, when they recite that, although gas might not be found, yet that oil, or even water, coming from the well would be dangerous to their residence. This is altogether too speculative. If the appellant company is willing to invest its money in a well from which may be brought to the surface of the earth an uncontrollable element productive of the evils feared by appellees, it must be allowed to do so at the hazard to itself of all the consequences for which it would thus become liable. But if the well may be sunk, and the gas, oil, or water therefrom, if any, can be so controlled and managed as to cause no appreciable injuries to appellees or to any one else, then such reasonable and lawful use of property ought not to be prevented by the courts. To do so would be sheer usurpation of arbitrary power.

We do not think the statute alluded to, section 5108, Burns' R. S. 1894 (Acts 1889, p. 22), in relation to condemnation proceedings for gas pipe lines, and providing that lands for such purposes shall not be condemned within seventy-five yards of any dwelling or barn, has any application here. Appellant had not instituted any condemnation proceedings, but was at work on its own land. Besides, the statute permits pipes to be laid along a public highway, notwithstanding the nearness of the buildings named; and, in the

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case at bar, not only was appellant engaged in sinking a well and laying pipes on its own lands, but there was a public highway between its lands and those of the appellees.

We are, therefore, not satisfied, that the record presents a case warranting the issuing of the writ of injunction. The judgment is reversed, with instructions to sustain the demurrer to each paragraph of the complaint, and to overrule the separate demurrers to the second paragraph of the answer, and for further proceedings not inconsistent with this opinion.

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BARR, AUDITOR, v. STATE, EX REL. READING.

[No. 17,956. Filed October 7, 1897.]

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**COUNTY.**—*Appointment of Attorney by Superior Court.*—*Statute Construed.*—It is not within the power of a superior court, under section 1481, Burns' R. S. 1894 (1415, R. S. 1881), authorizing the courts of record to allow sums to persons performing services under the orders of the court, to bind the county to pay for the services of an attorney appointed by such court to defend an action brought in the circuit court of the same county to test the constitutionality of the law creating the superior court. *pp. 427, 428.*

**SAME.**—*Treasurer.*—*Employment of Counsel.*—A county is not required to employ or pay counsel to defend its treasurer in an action brought to enjoin the payment of a warrant issued by the county auditor. *p. 428.*

From the Lake Superior Court. *Reversed.*

*Johannes Kopelke*, for appellant.

*Wilbur B. Reading*, for appellee.

**MONKS, J.**—It appears from the record that after the Superior Court of Lake county was established, in 1895 (Acts 1895, p. 210, sections 1426 a1, 1426 b2, Supplement to Burns' R. S. 1894), that said court made an allowance for books furnished to said

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court for its use, and ordered the same paid out of the treasury of Lake county, and a certified copy of said allowance was filed in the office of the auditor of said county, who delivered to the party to whom said allowance was made, a warrant upon the treasurer of said county for the amount of said allowance. After said warrant was drawn, and before the same was paid, Bartlett Woods commenced an action in the Lake Circuit Court against Thomas McCay, treasurer of said county, to enjoin him from paying said warrant, issued upon the order of allowance made by the Lake Superior Court, on the ground that the act establishing said court was unconstitutional and void. On the same day that said action was commenced by said Woods, the Lake Superior Court appointed the relator, Reading, to appear in said Lake Circuit Court, as an attorney, and defend "any and all actions which may be brought involving the constitutionality of the act creating said court." That said relator did appear for the defendant, McCay, treasurer, in said action, and defended the constitutionality of said law in the Lake Circuit Court, and on appeal in this court, where the law was adjudged constitutional. *Woods v. McCay, Treas.*, 144 Ind. 316. On November 4, 1895, the Lake Superior Court allowed the relator for said services \$225.00 against Lake county, and ordered the same paid, and appellant, upon proper demand, refused to issue a warrant on the treasurer of Lake county therefor. The relator thereupon commenced this action to compel by mandate appellant to issue said warrant, and the trial of said cause resulted in a judgment and order for a peremptory writ commanding appellant to draw said warrant.

Appellee claims that the allowance was made by the Lake Superior Court to the relator for services as attorney in said cause, under the provisions of sec-

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tions 3 and 4, of an act approved May 27, 1852, 1 R. S. 1852, p. 101, being sections 1480, 1481, Burns' R. S. 1894 (1414, 1415, R. S. 1881), and urges that "no discretion remains with the auditor, to whom the warrant is certified, but it is his imperative duty to draw his warrant on the county treasurer for the amount certified, and that it is not competent for him to attack the order of the court making the allowance. *Board, etc., v. Courtney*, 105 Ind. 311; *Gill v. State*, 72 Ind. 266." Said sections are as follows: Section 1480 (1414), 3, *supra*. "He [the auditor] may also draw his warrant upon the treasurer for a sum allowed, or certified to be due by any court of record authorized to use a seal and having jurisdiction beyond that of the justices of the peace, or by the board of county commissioners."

Section 1481 (1415), 4, *supra*. "The said courts may allow sums to persons serving as assistants to the sheriff, in preparing the court-house for the reception of such courts, and in the preservation of order, and in attendance upon juries, and to persons performing any services under the order of such court. But the number of such assistants employed shall never exceed the actual necessity of the case."

Section 1 of said act, being section 1478, Burns' R. S. 1894 (1412, R. S. 1881), provides that "No money shall be drawn from the treasury of any county, except by authority of law, and in conformity with the rules hereinafter prescribed." The cases cited do not sustain appellee's contention. In *Board, etc., v. Courtney, supra*, the appellee had been appointed to defend a poor person by the Park Circuit Court, in a case sent to that court on change of venue from another county, and this court held that, although the court appointing him had made no allowance for his services, he was entitled to recover the reasonable value thereof

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Barr, Auditor, v. State, *ex rel.* Reading.

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from the county of Montgomery, in which the prosecution was commenced. One of the reasons assigned for this holding was, that if the Park Circuit Court had made the allowance, the amount fixed would not and could not have been conclusive on Montgomery county, and that therefore the failure to allow anything did not deprive the claimant of his rights. The other case, *Gill v. State, ex rel.*, 72 Ind. 266, was decided under a different statute from the one involved in this case. Moreover, said case is, perhaps, overruled by the cases, *Trant, Aud., v. State, ex rel.*, 140 Ind. 414; *State, ex rel., v. Jamison*, 142 Ind. 679.

The real question in this case is, was it within the power of the Lake Superior Court to bind the county to pay for the relator's services as attorney by appointing him to appear in the case of *Woods v. McCay, Treas.*, in the Lake Circuit Court and defend the constitutionality of the law creating the Lake Superior Court.

In *Rudisill v. Edsall*, 43 Ind. 377, the court made an allowance to Edsall for services in attending court while he was acting as clerk during the year 1870; and it was claimed that said allowance was made under section 4 of the act of 1852, being section 1481 (1415), *supra*, but this court held that such services were not contemplated by said section, and that said allowance was without authority, and void. The services contemplated by said section are such as are necessary to the administration of justice, and the orderly transaction of the business in the court empowered to make the allowance. This section has been held to authorize an allowance for service performed in defending, under the order of court, a poor person charged with a crime in said court. *Board, etc., v. Courtney, supra*; *Gordon v. Board, etc.*, 52 Ind. 322; *Board, etc., v. Wood*, 35 Ind. 70. It has also been held

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Barr, Auditor, v. State, *ex rel.* Reading.

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that a court of superior jurisdiction has the inherent power, without a statute, to appoint an attorney to defend a poor person, or to assist in the prosecution of a criminal cause in such court, and thereby charge the county with the payment of such services. *Webb v. Baird*, 6 Ind. 13; *Board, etc., v. Courtney, supra*, p. 314; *Board, etc., v. Gordon, supra*; *Board, etc., v. Wood, supra*; *Tull, Treas., v. State, ex rel.*, 99 Ind. 238.

It is true, that when a court is once established and its jurisdiction defined, it has the inherent power to perform the duties required of it, whether expressly granted, or necessarily implied. There are inherent powers in all courts of superior jurisdiction which do not depend upon legislation, but spring from the nature and constitution of the tribunals themselves. These powers, however, are judicial, and such incidental powers as are necessary to the exercise thereof. *Tull, Treas., v. State, ex rel., supra*, p. 242 and cases cited.

It is not claimed, however, by appellee that said allowance was made by virtue of any inherent power of the court, but said allowance is sought to be sustained under the sections cited.

In this case, the Lake Superior Court appointed the relator to defend an action, not commenced or pending in that court, but in the Lake Circuit Court, an action to enjoin the county treasurer from paying a warrant drawn by the county auditor for a sum allowed by the Lake Superior Court. The county was not required to employ or pay an attorney to defend said action for the county treasurer. *Miller v. Embree*, 88 Ind. 133. The person directly interested in the payment of said allowance was the person to whom the same was made.

It is clear that section 1481 (1415), *supra*, when con-

Findling *et al.* v. Lewis *et al.*

strued with the other sections of said act, did not authorize an allowance for the services rendered by the relator, and that said allowance was without authority, and void.

Judgment reversed, with instructions to sustain the demurrer to the amended application for the alternative writ, and for further proceedings in accordance with this opinion.

## FINDLING ET AL. v. LEWIS ET AL.

[No. 18,141. Filed October 7, 1897.]

**JUDGMENT.—Review.—Complaint.**—A complaint to review a judgment should point out the error complained of, and set out the record to be reviewed, either by embodying same in the complaint, or by exhibit properly referred to and identified so as to become substantially a part of the complaint.

From the Tipton Circuit Court. *Affirmed.*

Joshua Jones, for appellants.

R. B. Beauchamp, Gifford & Nash and Gifford & Coleman, for appellees.

HOWARD, J.—The record in this case, as was said in *Coen v. Funk*, 26 Ind. 289, “not only presents a lamentable state of confusion, but is in many other respects a most extraordinary one.” The action seems to have been an attempt to have a judgment reviewed. The court sustained a demurrer to the complaint for review. This ruling was apparently correct, whatever may have been the merits, if any, of the original action, or actions.

The complaint in review alleges that on December 17, 1894, the appellants filed their complaint to set aside a judgment rendered against them on March 5,

148	429
151	38
151	41

148	429
154	27
155	80

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1892, and to vacate a sheriff's sale thereunder; also that the appellees appeared and demurred to said complaint, which demurrer was sustained, and judgment rendered thereon by the court. Nothing further appears. It is very doubtful whether this is sufficient. The record to be reviewed is not set out in the complaint, nor is it even referred to therein as an exhibit. It is true that a recital appears in the transcript stating that a copy of the record to be reviewed is set out as an exhibit, which exhibit itself also appears in the transcript. This, however, we do not think sufficient. The complaint for review should itself set forth a complete record of the case, or at least so much thereof as is necessary to fully present the error complained of. This record should be embodied in the complaint, or should, at least, be so referred to and identified as an exhibit as to become substantially a part of the complaint. *McDade v. McDade*, 29 Ind. 340; *Comer v. Himes*, 58 Ind. 573. The complaint in this case, besides, does not indicate what error of law, if any, was committed in rendering the judgment to be reviewed. The complaint itself should point out the error complained of.

Three successive judgments were rendered against appellants, the original judgment of foreclosure, the judgment refusing to set aside the judgment of foreclosure, and the judgment denying a review of the latter. In the condition of the record, we are unable to say that any of the judgments so rendered was erroneous.

Judgment affirmed.



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State, *ex rel.* Riley, *v.* Taggart, Auditor, *et al.*

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STATE, EX REL. RILEY, *v.* TAGGART, AUDITOR, ET AL.

[No. 18,245. Filed October 7, 1897.]

**TAXES.**—*County Treasurer.*—*Collection of Unpaid Taxes Charged to Treasurer in His Accounting.*—*Statutes Construed.*—Section 162 of the tax law of 1872 (Acts 1872, p. 102), providing that whenever a county treasurer shall have charged himself and accounted for taxes which have not been paid to him such taxes shall be deemed as due him personally, whether in or out of office, and may be collected by him in the same way as other taxes are collected, must be construed with section 288 thereof, limiting such right to collect for his own use from the personal property of the tax debtor, and within one year from the time of settlement. pp. 433-435.

**MANDAMUS.**—*To Compel Auditor to Place Taxes on Tax Duplicate Accounted for by Treasurer.*—The assignee of a tax lien, for taxes accounted for by a county treasurer in his annual settlement with the county auditor, cannot maintain mandamus proceedings to compel such auditor to place such taxes on the tax duplicate, after a period of nearly twenty years had elapsed from the time it was alleged that the assignor was charged with and accounted for the taxes. pp. 435, 436.

From the Marion Circuit Court. *Affirmed.*

*Fishback & Kappes* and *E. A. Parker*, for appellant.

*Roscoe O. Hawkins*, *Horace E. Smith*, *Wm. N. Harding* and *Alfred R. Hovey*, for appellees.

**JORDAN, J.**—On the fourth day of September, 1894, the relatrix, Elizabeth Riley, filed her petition for a mandamus to compel Taggart, as the auditor of Marion county, Indiana, to place upon the tax duplicate certain taxes, claimed to be a lien in her favor, on certain described real estate, situate in the city of Indianapolis. The action seems to have been continued upon the docket of the lower court until after the expiration of Taggart's term of office, in November, 1895,

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*State, ex rel. Riley, v. Taggart, Auditor, et al.*

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when Smith, his successor, was substituted in his place. Separate demurrers upon the part of appellees, Taggart and Smith, were sustained to the alternative writ of mandate, and the relatrix refusing to proceed further, judgment was rendered against her for cost. The action of the court in sustaining these demurrers are the errors complained of in this court. It is, among other things, substantially alleged in the petition and alternative writ, that the defendant, Benjamin F. Riley, was on October 17, 1874, the treasurer of Marion county, Indiana, and that on said day he charged himself with and accounted for certain taxes, which are set out in the petition, and that said taxes were not credited to him in his final settlement with the county, nor was the tax duplicate at any time, or in any manner, canceled or satisfied as to said taxes. That neither relatrix nor said Benjamin F. Riley has been reimbursed in any manner for said taxes, but the same all remain a valid and perpetual lien upon the property described therein, principal, interest, penalties and cost. It is shown by further averments that one Nicholas R. Ruckle, on said 17th day of October, 1874, was the owner of the real estate described, and at said date liable to the payment of the taxes. It is further alleged that these taxes, without the consent of Benjamin F. Riley, were dropped from the tax duplicate of the county. All right of said Benjamin F. in or to said tax claim is charged to have passed to the relatrix before the beginning of the action, by an assignment by him, and it is averred that at the time of said assignment, said Riley being out of office, was entitled to have the taxes collected for his own use as other taxes are collected. It is also alleged to be the official duty of the auditor to place these taxes upon the duplicate, which duty, on demand, he has refused to discharge, and the prayer is for a mandate to com-

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*State, ex rel. Riley, v. Taggart, Auditor, et al.*

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pel him to discharge this duty. The appellant bases the right of Benjamin F. Riley, before the assignment to the taxes in dispute, on section 162 of the tax law of 1872. 1 Davis R. S. 1876, p. 113 (Acts 1872, p. 102). This section provides as follows: "Whenever any county treasurer or collector for any previous year shall have charged himself with, and accounted for, any tax that shall not have been paid to him, such tax shall be deemed and taken as due to him personally, whether in or out of office, and may be by him collected in the same way as other taxes due and unpaid are collected."

Section 155 of the same statute provided in the first instance for the collection of taxes due and unpaid by distress and sale of the goods and chattels of the delinquent taxpayer. Sections 177 and 178 provided for refunding to the county treasurer money paid and accounted for by him by reason of erroneous charges on the duplicate, or from other causes, etc. Section 180 requires annual settlements to be made by the treasurer with the auditor on the third Monday of April. Section 238 is as follows: "If any county treasurer, on making settlement with the county auditor, shall stand charged with any tax remaining unpaid, and shall not receive a credit therefor in such settlement, such treasurer may collect such tax for his own use, at any time within one year after such settlement, either by distress and sale, as hereinbefore provided, or by action of debt in his own name, before any justice of the peace, or court having jurisdiction."

This last section gave to a county treasurer who was charged with, and had accounted for taxes in his settlement with the auditor, and for which he had not received a credit, two remedies to enforce the collection of such taxes for his own use, within one year after

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State, *ex rel.* Riley, *v.* Taggart, Auditor, *et al.*

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such settlement. One, by distress and sale of personal property of the party liable for the taxes; second, by an action of debt against such person before any justice of the peace, or in any court having jurisdiction. See *Schaum v. Showers*, 49 Ind. 285. The tax law of 1872 was in force during Riley's term of office as treasurer, and until 1881, long after his term expired, when it was superseded by another law. It does not appear that he at any time, either within the prescribed limit of one year after the settlement in which he failed to receive the credit for the unpaid taxes charged to him, or at any other time, attempted to avail himself of either of these remedies, or any other provision of the law, in order to be reimbursed for the taxes so charged and accounted for by him to the county. There is no showing that Ruckle did not, during the time in question, own and have sufficient personal property in Marion county, which, under the law was primarily liable for the payment of these taxes, and out of which they, in the first instance, might have been collected by sale and distress, or upon execution on a judgment rendered in an action of debt. Sections 155, 162 and 238 must be construed together. The latter limited and confined the right of the treasurer, whether in or out of office, to collect for his own use, from the personal property of the tax debtor, the taxes mentioned in either of the last two sections by one or the other of the methods prescribed, within one year from the time of settlement. The decisions of this court have uniformly recognized the doctrine that the personal effects or goods of the delinquent taxpayer, situated in the county, are, under the law, first subjected to the collection of his taxes; and where he has sufficient personal chattels, a sale of his real estate, in the first instance, will not operate to pass a valid title to the purchaser. In the case at bar, as hereto-

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*State, ex rel. Riley, v. Taggart. Auditor, et al.*

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fore said, it does not appear that any attempt was made to pursue the personal property of Ruckle, neither is it disclosed that he had none, nor is there any excuse whatever shown for failure to do so within either the prescribed time, or any other; but, after permitting nearly twenty years to elapse, an appeal is made to a court of justice to compel the auditor to act, in order to enable the relatrix to enforce the payment of the taxes by sale of real estate formerly owned by Ruckle, but which, as insisted by appellees, has long since passed to innocent parties. While it is true if these taxes were still due to the State the lien against the lands would continue until they were paid, yet under the facts, no such right can be said to exist in favor of the relatrix. The tax statute expressly provided and pointed out an adequate remedy by which the collection of the taxes might have been enforced. It ought to have been pursued, but was not. As a general rule, under such circumstances, an action of mandamus will not lie. *Louisville, etc., R. R. Co. v. State*, 25 Ind. 177. The right to enforce payment of the taxes in question being barred by neglect to proceed in the manner and within the time provided by the statute, the auditor owed no duty, under the law, to the appellant, and therefore she was not entitled to the writ of mandate. Upon another view of the case, even if it could be said that the right to enforce the collection of her claim against the real estate set out in the petition still exists, she is, however, not entitled to ask any relief by way of mandamus proceedings. As heretofore said, a period of nearly twenty years had run from the time it is alleged that her assignor was charged with and accounted for the taxes, before she instituted this action. A period after which, under the statutes of limitation, no civil action can be commenced, had almost elapsed before any steps were

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taken looking to the enforcement of her alleged right; and then, after the rights of other persons, as claimed, had intervened, this extraordinary remedy is invoked. The delay, therefore, in acting, under the circumstances, is unreasonable, and renders the relatrix guilty of laches, and this fact alone would warrant a denial of her prayer for a writ of mandate. This rule is settled by many authorities. See *Jones v. Cullen*, 142 Ind. 335; *People v. Chapin*, 104 N. Y. 96, 10 N. E. 141; 14 Am. & Eng. Ency. of Law, pp. 107, 186.

Judgment affirmed.

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[No. 18,086. Filed October 8, 1897.]

148	436
149	912
149	218
149	415
148	436
155	374
155	680
155	86
148	436
167	648

**FRAUDULENT CONVEYANCES.**—*When Property Conveyed is Exempt from Execution.*—A conveyance of real estate cannot be set aside by creditors of grantor as fraudulent which if retained would be within the debtor's right of exemption. pp. 437, 438.

**EVIDENCE.**—*Admissibility.*—*Fraudulent Conveyances.*—In an action to set aside a conveyance as fraudulent, evidence supporting the right to exempt the property conveyed, at the time of the conveyance, repels the charge of fraud, and is admissible without a special plea setting up such right. pp. 438, 439.

**FRAUDULENT CONVEYANCES.**—*Interest of Wife not a Subject of.*—The interest of the wife in the husband's real estate is not, as to the husband's creditors, the subject of fraudulent conveyance. p. 439.

From the Clinton Circuit Court. *Affirmed.*

*J. V. Kent and Palmer & Palmer*, for appellant.

*John C. Farber*, for appellees.

**HACKNEY, J.**—The appellant sued the appellees to set aside, as fraudulent, a conveyance of real estate made by Isaac M. Pauley and wife, and subject said real estate to the payment of a judgment in favor of the appellant, and against said Pauley.

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*Isgrigg v. Pauley et al.*

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It is urged on behalf of the appellant, and conceded by the appellees, that the trial court heard the evidence, and found for the appellees, upon the theory that said Pauley was a resident householder, and entitled to an exemption at the time of the conveyance complained of; that his wife was entitled, as against the appellant, to one-third in value of the real estate, as representing her inchoate interest therein, and that such exemption, and the one-third interest of the wife, left no part of the property conveyed, or its value, to be applied to the appellant's judgment.

Appellant's learned counsel insist that Pauley's right to an exemption was not an issue in the cause, since no answer alleging the right and demanding its enforcement was specially pleaded.

The only assignment of error by the appellant is upon the action of the lower court in overruling his motion for a new trial, and a reference to that motion discloses that no ruling of the trial court upon the admissibility of any evidence upon the subject of the exemption was questioned or urged as cause for a new trial.

It may well be doubted, therefore, whether this question is properly presented by the record. There are decisions of this court to the effect that, where a debtor, in an action affecting his property, desires to maintain his right of exemption, and secure the property to himself against such action, as in attachment and otherwise, he must, by some special plea, set up his claim.

The question in the case before us is as to whether it is fraudulent for one having the right of exemption to transfer his property which is subject to such right, intending thereby to remove the property beyond the reach of creditors. In other words, is it fraudulent to dispose of property, which if retained, is within the debtor's right of exemption, and which he desires

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shall be exempt? In *Blair v. Smith*, 114 Ind. 114, 126, 5 Am. St. 593, it was said: "Property exempt from execution is not subject to any claim of the creditor, but is absolutely free from all claims of creditors. No execution or other writ is a lien upon it. The creditor has no claim upon it in any form, and it is impossible to conceive any logical ground upon which property not subject to the claims of creditors can be held to have been fraudulently conveyed. If creditors have no interest in the property, it is inconceivable that they can justly claim that in disposing of it the debtor has been guilty of fraud. The whole doctrine of annulling fraudulent conveyances rests upon the ground that the creditor has the right to resort to the property, and where he has no such right it is impossible that a conveyance can be deemed fraudulent. Surely, a man may do what he will with property which is his own, and free from all claims of creditors." The rule stated has the support of all the recent holdings of this court upon the subject. *Dumbould v. Rowley*, 113 Ind. 353; *State, ex rel., v. Harper*, 120 Ind. 23; *Barnard v. Brown*, 112 Ind. 53; *Phenix Ins. Co. v. Fielder*, 133 Ind. 557; *King v. Easton*, 135 Ind. 353; *Moss v. Jenkins*, 146 Ind. 589; *Burdge v. Bolin*, 106 Ind. 175, 55 Am. Rep. 724; *Faurote v. Carr*, 108 Ind. 123; *Taylor v. Duestenberg*, 109 Ind. 165.

Where the issue is one of fraud in making a conveyance to defeat creditors, evidence supporting the right to exempt the property conveyed, at the time of the conveyance, repels the charge of fraud, for it is the right of one to dispose of his property, regardless of creditors, where such property, under the exemption laws, may be freed from the claims of creditors. Here, the issue is as to the existence of fraud, and it is not sought to secure an exemption to the debtor of all or a part of his property. We think, therefore, that



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the evidence of the right was admissible to rebut the charge of fraud without a special plea setting up the right.

Nor can there be any doubt that as to Mrs. Pauley, an interest in the real estate, equal to one-third of its value, would have been free from the judgment of the appellant, both before and after the conveyance. Section 2669, Burns' R. S. 1894 (2508, R. S. 1881); *Taylor v. Duesterberg*, *supra*; *Currier v. Elliott*, 141 Ind. 394, and cases therein cited. As to her, it may be said, as was said with reference to the property exempt to her husband, property against which the creditor cannot enforce his claim is not, as to such creditor, the subject of fraudulent conveyance.

Much of the discussion of counsel is devoted to the values of the property as shown by the evidence. The lower court had the right to accept, as against the appellant, the evidence most favorable to the appellees, and we are obliged to do so. From that standpoint, the real and personal property of Pauley did not exceed in value eight hundred dollars, and the real estate was subject to the wife's inchoate one-third interest, or the sum of two hundred and fifty dollars or more, thus leaving, under the right of exemption, less than six hundred dollars.

It is not true, as urged by the appellant's learned counsel, that the wife must take her inchoate interest in the property exempt to the husband. On the contrary, she is given, by the statute cited, one-third of his realty free from creditors, and the right of exemption to him does not impair the value of her interest. Nor can it be said that her interest affects his right of exemption, so as to reduce it below the value of six hundred dollars.

The record discloses no error, and the judgment is affirmed.

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Campbell v. Galloway et al.

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## CAMPBELL v. GALLOWAY ET AL.

[No. 18,401. Filed October 8, 1897.]

**SPECIFIC PERFORMANCE.**—*Contract for Sale of Lease.*—*Agency.*—*Unauthorized Letter.*—A contract for the sale of a gas and oil lease entered into by one purporting to be the agent of the owner of the lease cannot be enforced against the principal, where the letter appointing the agent was sent without the authority of the principal, and was promptly repudiated by him. pp. 446, 447.

**PRINCIPAL AND AGENT.**—*Real Estate Broker.*—*Authority to Find Purchaser.*—*Letter.*—A letter to a real estate agent by the owner of a lease, stating that the writer had paid a specified amount for the lease and would not sell it for less than another specified amount, and all over that sum the agent could have, authorizes the agent to find a buyer, but not to sell the lease. pp. 443, 446.

From the Wells Circuit Court. *Affirmed.*

*L. Mock, J. Mock, G. Mock, J. S. Dailey, A. Simmons and F. C. Dailey, for appellant.*

*A. L. Sharpe and C. E. Sturgis, for appellees.*

MCCABE, C. J.—The appellant sued the appellees to compel specific performance of a contract concerning real estate.

The issues formed were tried by the court, resulting in a special finding of the facts, upon which the court stated conclusions of law favorable to the defendants, and rendered judgment accordingly, over the plaintiff's motion for a new trial.

The conclusions of law, and the action of the court in overruling the plaintiff's motion for a new trial are assigned for error. The other assignment for error is waived by appellant in not discussing the same in his brief.

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Campbell v. Galloway *et al.*

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The substance of so much of the special finding as is material to the determination of the case is as follows:

The appellee, John Galloway, a resident of Jamestown, New York, on August 17, 1893, visited Wells county, Indiana, on behalf of himself, personally, and E. H. Jennings and Brothers, of Pittsburg, Pa., to secure leases upon lands for the purpose of operating for natural gas and petroleum, and on that occasion procured J. C. & J. W. Holloway to execute to defendants an instrument in writing in these words and figures, to-wit:

"In consideration of the sum of \$200.00, the receipt of which is hereby acknowledged, we, John W. Holloway and Jonathan C. Holloway, of Wells county, Indiana, of the first part, hereby grant to E. H. Jennings & Bro. and John Galloway second party, all the oil and gas in and under the following described premises, together with the right to enter thereon at all times for the purpose of drilling and operating for oil or gas, and to erect and maintain all buildings and structures and lay all pipes necessary for the production and transportation of oil and gas taken from said premises. Excepting and reserving, however, to first party the one-eighth ( $\frac{1}{8}$ ) part of the oil produced and saved from said premises to be delivered in the pipe line of which second party may connect his wells, namely: (then follows a description of sixty-seven acres of land in said county) To have and to hold the above premises on the following conditions: If gas only is found in sufficient quantities to transport, second party agrees to pay first party one hundred dollars for the product of each and every well so transported, and the first party to have gas free of cost to heat five stoves, and light ten jets in the dwelling house. Whenever first party shall request it, second party shall bury all oil and gas lines, and pay all damages done to growing crops

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by reason of burying or removing said pipe lines. In case no well is completed within six months from this date, this grant shall become null and void unless second party shall pay to first party thirty-three and fifty one-hundredths dollars for each six months thereafter such completion is delayed. The second party shall have the right to use sufficient gas, oil, or water to run all machinery for operating said wells, and also the right to remove all its property at any time.

"The rentals are payable at the Farmer's Deposit Bank, at Montpelier, Ind. The party of the second part have the right to surrender this grant at any time and be released from any further fulfillment of any stipulations that the grant may contain. Any well producing forty barrels or over of oil per day, the first party to have the one-sixth royalty instead of the one-eighth, during the same. Less than forty barrels per day shall be one-eighth. It is understood between the parties to this agreement that all the conditions between the parties hereto shall extend to their heirs, successors, executors, and assigns.

"In witness whereof the parties hereto set their hands and seals this 17th day of August, A. D. 1893. John W. Holloway, Jonathan C. Holloway, E. H. Jennings & Bro., John Galloway."

This instrument was duly acknowledged by the Holloways.

The interest of the defendants in the lease of the lands described therein was fixed by an agreement of said Galloway on the one hand, and E. H. Jennings & Brother on the other, and was that an undivided one-fourth part thereof was owned by the defendant, Galloway, and E. H. Jennings & Brother the remainder; and neither of said owners had any authority to sell, nor contract to sell, the interest of the other, and such lease-hold estate was not held or owned by the defendants as partnership property.

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Campbell v. Galloway *et al.*

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On May 21, one James C. Gibney, then unacquainted with any of the defendants, being a resident of Montpelier, Indiana, mailed and addressed to defendant a letter reading as follows, to-wit:

“Mr. John Galloway, Pa.—Dear Sir: I am in the real estate business in this place and devoting my time principally to dealing in leases and productions. I have enquiries occasionally for leases, and might perhaps find a purchaser for your Holloway lease in Nottingham township, Wells county, Indiana, if it is for sale. Please notify me if it is for sale and what the price and terms are, and what there is in it for me. Yours very truly, James C. Gibney.”

This letter was received by said Galloway, in due course of mail, at Pittsburg, Pa., on May 24, 1894, when said Galloway was preparing to start on a business trip to Tennessee, and hurrying to enter on said journey.

Upon reading said Gibney's letter, defendant Galloway, in the absence and without the knowledge of defendants Jenningses, directed a clerk in the employ of the latter to reply to the letter by writing to said Gibney that he, Galloway, would not join in selling the said lease for less than \$250.00, and that on his return from Tennessee he would visit Indiana and examine the leased premises; that said clerk then wrote a letter to said Gibney in the following words and figures, to-wit:

“James C. Gibney, Esq.—Dear Sir: Your letter of the 21st at hand. I paid \$200.00 for the lease and will not sell it for less than \$250.00 net to me. All over that sum you can have. Yours truly, John Galloway, ‘K.’”

This letter was written and sealed up by said clerk, whose name was Kemp, during the temporary absence of defendant Galloway, and without the knowledge and consent of the defendants, Jenningses, and with-

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out being seen or its contents known by defendant Galloway, whose name was signed thereto by Kemp with his own initial "K;" that presently on the return of Galloway, and in the absence of the other defendants, said Kemp informed said Galloway of the contents of said letter, which had not yet been mailed. whereupon said Galloway repudiated said letter, directed said Kemp not to mail nor send said letter, and said Galloway thereupon at once departed for Tennessee, where he remained for some days; and during his absence, without the knowledge of any of the defendants, said letter was by some means mailed and reached said Gibney.

Said Gibney thereupon, in the absence and without the knowledge of the defendants or any of them, executed to the plaintiff, Campbell, the writing set out in the complaint as the exhibit of the contract sought to be specifically enforced; and said Campbell delivered to said Gibney a check for \$250.00, signed by said Campbell, and payable to said Gibney, upon the Pennville Bank, of Pennville, Jay county, Indiana.

The contract referred to reads thus: "Know ye that this contract made and entered into on the 28th day of May, 1894, by and between John Galloway, by James C. Gibney, his agent, and Frank Campbell, witnesseth; that said Galloway hereby agrees to sell and transfer unto said Campbell one certain oil and gas lease or grant now owned by said Galloway on lands of J. W. & J. C. Holloway, containing sixty-six acres more or less (describing the same premises described in the lease first above set forth). In consideration of said sale and transfer said Campbell agrees to pay said Galloway \$250.00 cash in hand at the Farmer's Deposit Bank, in Montpelier, Indiana, and to pay the commission charges of the said Gibney for making this sale. Said Galloway agrees to make a good and sufficient

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deed of conveyance to said grant or lease-hold with all due and proper diligence.”

On June 8, 1894, by a letter mailed on that date at Montpelier, Indiana, written by said Gibney, defendant Galloway was notified that plaintiff, Campbell, had bought the said oil lease from said Gibney and brought suit against defendant Galloway (the other defendants not having been made parties until afterwards) to compel a conveyance of said lease.

After receiving said letter defendant Galloway came to Montpelier, where on June 12, 1894, he met said Gibney for the first time and had an interview with him concerning the alleged sale, but even then said Gibney did not inform said Galloway that said Gibney had executed to plaintiff any written contract of sale of the said lease, nor that any check had been received by said Gibney.

That in said interview between said Gibney and defendant Galloway the latter at once repudiated the letter in his name to said Gibney, and repudiated the authority of said Gibney to make the sale of said oil lease, and demanded of him to produce plaintiff, Campbell; but this said Gibney failed to do, and said Galloway never met nor knew him until July 24, 1894, when he met him on the leased premises at a time when defendants had completed the first oil well drilled by them on the premises.

That neither plaintiff nor said Gibney ever paid or offered to pay the defendants, or either of them, any part of the \$250.00 the consideration for said sale, nor did the plaintiff ever pay or offer to pay said Gibney any part of such consideration, or to anyone else, for the use of either of the defendants, nor did the plaintiff make any demand upon any of the defendants, nor upon said Gibney, for the conveyance of said lease.

The only demand ever made upon any of the de-

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defendants was a written request said Gibney sent to said Galloway by mail, May 27, 1894, which said Galloway received on his return from Tennessee.

The Kemp mentioned above was a bookkeeper and clerk in the office of the defendants, the Jenningses, but never had any authority from the latter, nor either of them, to write the letter set out above, nor to make any sale or to sell the lease aforesaid, and he never was in the employ of said Galloway.

Said Gibney never offered said check for \$250.00 to any of the defendants, but retained it himself until October 10, 1895, after this trial had begun, when he indorsed and delivered it back to the plaintiff, who never offered it to any of the defendants. The plaintiff never paid or tendered any money to the defendants, nor to anyone for their use, but, on October 10, 1895, while the trial of this cause was in progress, and several hours after it had begun, the plaintiff paid the clerk of the court \$250.00, but for whose use has not been shown.

That the plaintiff nor said Gibney never contracted nor attempted to contract for the purchase of any interest in the lease belonging to the defendants, the Jenningses.

The appellants, after insisting that the conclusions of law in favor of the defendants were erroneous, turn and place their chief reliance on the alleged error in overruling the motion for a new trial, contending that many of the material facts found are in direct conflict with uncontradicted evidence.

Be that as it may, there is one fact found which they do not claim is contradicted by any evidence, and that fact, we think, is fatal to plaintiff's right to recover, or to obtain specific performance of the alleged contract, and that fact is the lack of authority on the part of Gibney to make the contract sued on.



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There is no dispute in the evidence that the letter to Gibney with Galloway's name signed to it was both written and sent without his authority, and that he promptly repudiated the letter when it first came to his knowledge, and also when he first learned that it had reached the hands of Gibney he repudiated it. And it is clearly established that he never ratified either the act of Kemp in writing the letter or the act of mailing the same to Gibney, by whomsoever that act was done. These facts are also found. Besides, the letter, even if it had been written and sent to Gibney by the request and direction of Galloway, was at most only an authority to find a purchaser for the lease, and not an authority to sell it. This proposition is fully settled by the decisions of courts of last resort of such respectability that we deem it unnecessary to do more than cite them. *Grant v. Ede*, 85 Cal. 418, 24 Pac. 890, 20 Am. St. 239, and cases there cited; *Duffy v. Hobson*, 40 Cal. 240, 6 Am. Rep. 617; *Armstrong v. Lowe*, 76 Cal. 616, 18 Pac. 758; *Condon v. Osgood*, (Ia.), 65 N. W. 1003; *Jenkins v. Locke*, 3 App. D. C. 485.

We therefore conclude that the circuit court did not err in its conclusions of law, nor in its refusal to grant a new trial.

The judgment is affirmed.

## SCHMIDT ET AL. v. ZAHNRDT.

[No. 17,949. Filed May 25, 1897. Rehearing denied October 8, 1897.]

NOTICE.—*Records of Deeds and Mortgages*.—The recording of deeds and mortgages is notice to subsequent purchasers and incumbrancers only p. 451.

MORTGAGES.—*To Secure Advancements*.—Where the mortgagee has bound himself to make or incur liabilities by advancing money to

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153	678
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the mortgagor from time to time, such advancements, when made, relate back, and the mortgage will be a valid lien for the advancements made as against a subsequent purchaser or incumbrancer with notice, actual or constructive, of the mortgage. pp. 451, 452.

**SAME.—Foreclosure.—Subsequent Mortgage.**—When it is shown by complaint or cross-complaint to foreclose a mortgage that any of the defendants are subsequent mortgagees, it must be alleged and proven that they took such subsequent mortgage with actual notice of the mortgage sued on, or that it was recorded within the time fixed by statute, or before the execution of the subsequent mortgage. p. 455.

**PLEADING.—Cross-Complaint.**—A cross-complaint must be sufficient within itself, without aid from any other pleadings in the case; yet for matters of mere description and identification many of the allegations of the complaint may be referred to. p. 456.

**MORTGAGES.—Not Recorded Within Forty-five Days.—Subsequent Mortgage.—Statute Construed.**—Under section 8350, Burns' R. S. 1894, a mortgage not recorded within forty-five days from the time of its execution is fraudulent and void as against a subsequent mortgage taken in good faith and for a valuable consideration. p. 457.

**APPEAL.—Weight of Evidence.**—The Supreme Court will not weigh the evidence and pass upon the conflicts thereof. p. 457.

From the LaPorte Circuit Court. *Affirmed.*

*H. B. Tuthill and J. F. Gallaher*, for appellants.

*F. E. Osborn and M. T. Kmeger*, for appellee.

**MONKS, J.**—Appellee brought this suit against appellants, Schmidt and wife, to foreclose a mortgage executed by them, making appellant, Tuthill, a party defendant.

Schmidt and wife were defaulted, and appellant, Tuthill, filed a general denial and a cross-complaint to foreclose a mortgage, which appellee answered by general denial.

The court tried the cause and made a special finding of facts and stated its conclusions of law thereon in favor of appellee. To the conclusions of law the appellant, Tuthill, excepted. Appellant Tuthill, filed a

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motion to modify the conclusions of law, also a motion for a new trial, each of which was overruled. Judgment was rendered in favor of appellee.

The errors assigned and not waived call in question the conclusions of law, also the action of the court in overruling the motion to modify the conclusions of law, the motion for a new trial, and the motion to modify the judgment.

It appears from the special finding that, on April 25, 1893, appellant Tuthill, sold and conveyed the real estate in controversy to his co-appellant Schmidt; that said deed was duly recorded. Schmidt executed to appellant, Tuthill, his promissory note for \$350.00, the amount of the unpaid purchase money, and also at the same time executed a mortgage on said real estate to secure said promissory note. Said mortgage was not recorded in the office of the recorder of said county until June 24, 1893, more than forty-five days after its execution. Afterwards, about the 1st of June, 1893, said Schmidt was engaged in the erection of a dwelling house upon said real estate, and for the purpose of erecting said house he negotiated a loan from appellee of \$1,000.00, to be paid to himself from time to time as needed in the erection of said dwelling. And on said 1st day of June, 1893, said Schmidt, with his wife, signed and acknowledged a mortgage on said real estate to secure said loan, evidenced by five promissory notes of \$200.00 each, due in one, two, three, four, and five years after date, respectively, with seven per cent. interest from date; that said notes were signed at the same time the mortgage was signed and acknowledged. Said mortgage was delivered to appellee and duly recorded on the 6th day of June, 1893, and within forty-five days after its execution. At the time said five notes payable to appellee were signed by

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Schmidt they were left in his possession, and afterwards, during the month of June, and before the recording of the mortgage to appellant, appellee paid to said Schmidt \$100.00 on said loan, and Schmidt gave to appellee the first note for \$200.00, due in one year after date; that said sum of \$100.00 was all the money paid by appellee to said Schmidt on said \$1,000.00 loan secured by said mortgage, until after the recording of the mortgage executed by Schmidt to appellant. At the time said last named mortgage was recorded, all the notes signed by Schmidt payable to appellee, except the first for \$200.00, due in one year, were still in the possession of Schmidt. It was not known at the time said mortgage was executed how much money said Schmidt would need in the erection of said dwelling, but when the same was completed, about August, 1893, it was found that \$950.00 would be required, and a credit was entered on the first note for \$50.00; that said money was borrowed and used in the erection of said dwelling house. Before taking said mortgage on June 6, 1893, appellee caused the records in the recorder's office of said county to be examined, and found the deed from appellant, Tuthill, to Schmidt, dated April 25, 1893, but found no record of any mortgage or other lien against said property. Appellee had no notice or knowledge of the existence of the mortgage to appellant, or that the purchase money for said real estate, or any part thereof, was unpaid, until after the execution of the mortgage by Schmidt to himself, nor until after he had paid the \$950.00 to said Schmidt, all the money coming to him upon the loan secured by the said mortgage.

Upon the facts, the court found as one of the conclusions of law, that the appellee's mortgage was the first lien, and appellant, Tuthill's mortgage was the second lien on said real estate.

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The facts found show that the mortgage was executed to appellee to secure \$1,000.00, to be advanced by him from time to time as needed in the erection by Schmidt of a dwelling house on the mortgaged real estate; in other words, to secure future advances, and that appellee had no actual notice of appellant's mortgage until after all the advances were made.

The general scope of the recording laws is prospective, and not retrospective. Recording deeds and mortgages is notice to subsequent purchasers and encumbrancers only. *Ackerman v. Hunsicker*, 85 N. Y. 43, 39 Am. Rep. 621; *Stuyvesant v. Hall*, 2 Barb. Ch. 151; *King v. McVickar*, 3 Sandf. Ch. 192; *Howard Ins. Co. v. Halsey*, 8 N. Y. 271.

The mortgage of the appellant, Tuthill, was not recorded until after the expiration of forty-five days from its execution, and appellee's mortgage was recorded first. The general rule under our statute is that under such facts appellee's mortgage would be the first lien. But appellant, Tuthill, contends that the same, if a prior lien, is only such to the extent of the money advanced by appellee to Schmidt before his, Tuthill's mortgage was recorded; that the recording of her mortgage was constructive notice thereof to appellee, and that the lien of all advances made after that date are junior to her mortgage.

The question as to which of said mortgages, under such circumstances, was the prior lien on said real estate seems to have been decided in this State. In *Brinkmeyer v. Brouneller*, 55 Ind. 487, this court declared the following proposition, sustained by the authorities: "First. Where the mortgagee has bound himself to make or incur liabilities, such advances, when made, shall relate back, and the mortgage will be a valid lien for advances made or liabilities incurred, against subsequent purchasers or incum-

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brancers with notice, actual or constructive, of the mortgage.

"Second. Where there is no obligation on the mortgagee, and such advances or liabilities are merely optional with him, and he has actual notice of a subsequent incumbrance or conveyance of the mortgaged premises, before making advances or incurring liabilities, his lien is not good, as against the subsequent purchaser or incumbrancer. See 11 Am. Law Reg. N. S. 273, and authorities there cited."

The authorities generally seem to sustain the first of said propositions. *Brinkmeyer v. Helbling*, 57 Ind. 435, 449, 450; *Crane v. Deming*, 7 Conn. 387; *Griffin v. Burtnett*, 4 Edw. Ch. (N. Y.) 673; *Boswell v. Goodwin*, 31 Conn. 74, 81 Am. Dec. 169; *Rowan v. Sharps' Rifle Mfg. Co.*, 29 Conn. 282, 329; *Commercial Bank v. Cunningham*, 24 Pick. 270, 35 Am. Dec. 322, and note; note to *Diver v. McLaughlin*, 20 Am. Dec., on p. 658; 15 Am. and Eng. Ency. of Law, p. 799; 1 Jones Mortg., section 370; 3 Pomeroy's Eq. Jurisprudence, section 1199.

While there is a conflict in the authorities as to the doctrine declared in the second proposition, yet the same is sustained by reason and authority. Many authorities declare that if the future advances are optional, the prior mortgage, which is duly recorded, has preference over subsequent recorded mortgages or conveyances, not only for advances previously made, but also for advances made after their recording without actual notice thereof; that recording the second incumbrance does not operate as constructive notice, but actual notice is required. *Brinkmeyer v. Browneller*, *supra*; *Ward v. Cooke*, 17 N. J. Eq. 99, and cases cited; *Williams v. Gilbert*, 37 N. J. Eq. 86; *Sayre v. Hewes*, 32 N. J. Eq. 652; *Nelson's Heirs v. Boyce*, 7 Marsh. (Ky.) 401, 23 Am. Dec. 411; *McDaniels*

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v. *Colvin*, 16 Vt. 300, 42 Am. Dec. 512; *Boswell v. Goodwin*, *supra*; *Crane v. Deming*, *supra*; *Rowan v. Sharps' Rifle Mfg. Co.*, *supra*; *Wilson v. Russell*, 13 Md. 494, 71 Am. Dec. 645; *Witczinski v. Everman*, 51 Miss. 841; *Truscott v. King*, 6 Barb. 346; *Craig v. Tappin*, 2 Sandf. Ch. (N. Y.) 78; *Robinson v. Williams*, 22 N. Y. 380; *Ackerman v. Hunsicker*, 85 N. Y. 43, 39 Am. Rep. 621; *Reynolds v. Webster*, 24 N. Y. Supp. 1133; *Frye v. Bank of Illinois*, 11 Ill. 367; *Tapia v. Demartini*, 77 Cal. 383, 19 Pac. 641, and cases cited, 11 Am. St. 288, and note; *Ripley v. Harris*, 3 Biss. 199; *Conard v. Atlantic Ins. Co.*, 1 Peters (U. S.) 386; *Shirras v. Caig*, 7 Cranch. 51; note to *Divver v. McLaughlin*, 20 Am. Dec. on pp. 661, 662; 15 Am. and Eng. Ency. of Law, pp. 800, 801; 3 Pomeroy Eq. Jur., section 1199; 1 Jones Mprtg., sections 364, 368-370, 372-374; 2 Am. Law Reg. (N. S.), p. 19 *et seq.*; 11 Am. Law Reg. (N. S.), 273, and authorities cited.

Chief Justice Redfield, in an article on this subject, in 2 Am. Law Reg. (N. S.), at p. 18, said: "The most important remaining inquiry is in regard to the extent, and kind of notice of the subsequent mortgage, which it is requisite the first mortgagee should have, in order to postpone his further advances to such intervening security. As a general rule, it has been considered that the registry of the second mortgage, will only be notice of its contents to *future* purchasers and incumbrancers, and not to *prior* incumbrancers, thus operating forward and not backward. \* \* \* We find the law established in some states, that the registry is full notice to the first mortgagee not to make further advances under his mortgage. \* \* \* But the general view of the American courts, and the uniform declaration of the English courts, as far as we know, is, that nothing short of notice in fact will have this effect. It is expressed under various forms of

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language, but the result of the whole is, that if the first mortgagee have knowledge of the existence of a second mortgage upon the estate, he cannot give further credit upon his prior mortgage, provided it is entirely optional with him, whether he make the advances or not. This has been often declared by judges and text writers, and may now be regarded as settled law, notwithstanding an occasional case seems to require something more."

The rule is thus stated in 15 Am. and Eng. Ency. of Law, p. 801: "Where the mortgage on its face gives such information as to the purpose and extent of the undertaking of the mortgagee that any one interested may, by ordinary diligence, ascertain the extent of the incumbrance, then the better view seems to be that the mortgage will have precedence over subsequent incumbrances, as to all advances made within the terms of a mortgage, whether before or after such junior incumbrance, even though the extent of the contemplated advances are not limited, and whether the mortgagee be bound to make the advances or not."

In 3 Pomeroy, Eq. Jurisprudence, section 1199, it is said concerning the question under consideration, that "The prior mortgage, therefore, duly recorded, has a preference over subsequent recorded mortgages or conveyances, or subsequent docketed judgments, not only for advances previously made, but also for advances made after their recording or docketing without notice thereof. As the record of the second encumbrance does not operate as a constructive notice, it requires an actual notice to cut off the lien of the prior mortgage; and the subsequent encumbrancer may, by giving actual notice, at any time prevent further advances from being made to his prejudice."

It is clear from what we have said, and the author-



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ites cited, that the court did not err in the conclusion of law, that appellee's mortgage was the first, and appellant, Tuthill's, the second lien on said real estate.

It is insisted, however, by said appellant that appellee's rights as a subsequent mortgagee depended upon section 3350, Burns' R. S. 1894 (2931, R. S. 1881), which provides that every conveyance or lease not recorded within forty-five days after the execution thereof, shall be fraudulent and void, as against any subsequent purchaser, lessee, or mortgagee in good faith and for a valuable consideration, "and that, under the authorities, to obtain the benefit thereof, he was required in his answer to appellant's cross-complaint to set up facts showing that he was a *bona fide* purchaser from Schmidt, without notice; that not having filed such answer, the pleadings present no question as to the priority of appellee's mortgage, and that for this reason the special findings and conclusions of law on that question were outside the issues in the case, and should be disregarded. The rule in this State is, that when it is shown, by the complaint or cross-complaint to foreclose a mortgage, that any of the defendants are subsequent mortgagees, that it must be alleged and proven that they took said subsequent mortgage with actual notice of the mortgage sued upon, or that it was recorded within the time fixed by statute, or before the execution of the subsequent mortgage. *Hoes v. Boyer*, 108 Ind. 494, 497; *Magee v. Sanderson*, 10 Ind. 261; *Peru Bridge Co. v. Hendricks*, 18 Ind. 11; *Scarry v. Eldridge*, 63 Ind. 44; *Faulkner v. Overturf*, 49 Ind. 265. But when it does not appear from the allegations of a complaint or cross-complaint to foreclose a mortgage, that any of the defendants thereto are subsequent mortgagees, it is not necessary to the sufficiency of the complaint or cross-complaint to allege that the mortgage had been recorded within the time

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fixed by law. *Hoes v. Boyer, supra; Mann v. State, ex rel.*, 116 Ind. 383, 385.

It was alleged in appellee's complaint that appellant, Tuthill, claimed to hold some lien on the real estate, the nature of which was unknown to appellee, and that the same was subsequent and subordinate to the lien of appellee's mortgage; it was also shown, by the facts alleged, that appellee's mortgage was duly recorded within the time fixed by the statute. Said appellant filed a general denial to the complaint, and also a cross-complaint to foreclose her mortgage. The allegations of the cross-complaint show that said appellant's mortgage was recorded more than forty-five days after its execution, but it is alleged that the same "is superior in all things to appellee's mortgage which he is endeavoring to have foreclosed in this action." Appellee answered said cross-complaint by a general denial. Under our system of pleading, a cross-complaint must be sufficient within itself, without aid from any other pleadings in the case. *Campbell v. Routt*, 42 Ind. 410; *Masters v. Beckett*, 83 Ind. 595; *Conger v. Miller*, 104 Ind. 592. Yet, for matters of mere description and identification many of the allegations of the complaint may be referred to. *Anderson v. Wilson*, 100 Ind. 402, 407. As the allegations of the cross-complaint show that said appellant's mortgage was not recorded until after the expiration of the term fixed by the statute, it would seem that the facts showing that said mortgage was "superior in all things to appellee's mortgage" should have been alleged instead of the mere conclusion of the pleader. However, we need not, and do not, determine the question of the sufficiency of the cross-complaint as against appellee.

It is sufficient to say that upon the issues so joined, one of the questions to be determined by the court

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was, which of said mortgages was the prior lien on the real estate, and that, therefore, the court's finding and conclusion that the lien of appellee's mortgage was prior to the lien of said appellant's mortgage was not without, but within the issues.

It was not necessary for the court to state in the findings that appellant, Tuthill's mortgage was fraudulent and void as against appellee. The facts found show that appellee was a subsequent mortgagee in good faith and for a valuable consideration, and that said appellant's mortgage was not recorded within forty-five days after its execution. Under such circumstances, said appellant's mortgage was fraudulent and void as against appellee, as provided in section 3350, Burns' R. S. 1894 (2931, R. S. 1881). In such a case, whether the instrument not recorded within the time fixed by statute is fraudulent and void as against a subsequent purchaser or mortgagee is not a question of fact, but of law as declared by the statute. The provisions of section 6649, Burns' R. S. 1894 (4924, R. S. 1881), have no application to such a case.

Under the well settled rule we cannot reverse this case upon the evidence, which is conflicting, because there is evidence which, considered alone, fully supports the findings. *Lawrence v. VanBuskirk*, 140 Ind. 481; *Childers v. First National Bank*, 147 Ind. 430.

What we have said disposes of all the questions presented.

Finding no available error, the judgment is affirmed.

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THE STANDARD OIL COMPANY OF INDIANA v. HELMICK.

[No. 18,088. Filed May 11, 1897. Rehearing denied October 8, 1897.]

MASTER AND SERVANT.—*Assumption of Risk*.—*Promise to Repair*.—

Where a servant, by reason of the promise of the master to make repairs, continues in the service after notice of a defect in tools or

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machinery augmenting the danger of the service, the servant may recover for an injury caused by such defect within such period of time after the promise to repair as would be reasonable to allow for such repairs to be made; but when such promise to repair is not general, but dependent upon the completion of a certain job of work, the servant cannot recover for an injury received by reason of such defect before the completion of such job of work. pp. 464-466.

NEGLIGENCE.—*Master and Servant*.—Negligence cannot be imputed to the master for failure to foresee and guard against a danger which is wholly improbable. p. 466.

From the Lake Circuit Court. *Reversed*.

*J. W. Youche* and *A. D. Eddy*, for appellant.

*Peter Crumpacker, John G. Erdlitz* and *Edward W. Wickey*, for appellee.

MCCABE, J.—The appellee sued the appellant to recover damages for a personal injury, caused to him, as alleged, by the negligence of the appellant as the employer of the appellee. The circuit court overruled a demurrer, for want of sufficient facts, to the complaint. The issues formed upon the complaint were tried by a jury, resulting in a special verdict under the law of 1895, upon which the court rendered judgment for the plaintiff.

The errors assigned call in question the action of the court in overruling the demurrer to the complaint, and the sufficiency of the facts found in the special verdict to support the judgment. The question of the sufficiency of the facts found in the special verdict to constitute a cause of action and to support a judgment is the same as that presented by the demurrer to the complaint for want of sufficient facts, and, therefore, we will only determine the sufficiency of the special verdict.

The verdict consists of 226 interrogatories and answers thereto, making it needlessly and inexcusably

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long. The substance of the special verdict is, that the plaintiff was a corporation from August 27, 1894, until the present time, owned and operated a manufacturing plant, in which, among other things, it manufactured candles; that candle-moulding machines were used therein; that plaintiff engaged as a servant for defendant in its said business of candle making, August 27, 1894, and was from that time so employed up to November 16, 1894, when he was injured, as hereinafter stated; that he had no knowledge of candle-making machinery at the time he engaged in defendant's service; that the candle-moulding machine No. 1, about which plaintiff was injured, had been in use and operation in making candles since the year 1885; that defendant had used and operated said candle-moulding machine for one year prior to the time plaintiff was injured; that plaintiff operated said No. 1 machine for one month prior to his injury, that being a part of the duty he engaged to perform. The separation of the candles from the moulds was accomplished in turning a shaft by means of a crank on the end thereof, made to turn by hand. The shaft ran longitudinally. When turned, it would elevate and remove the candles in the moulds therefrom. The end of said shaft was constructed with a square tenon onto which the eye of the crank would fit, so that it could not turn without turning the shaft. This crank was made to slip on and off of the shaft at will. It was used for the purpose of turning the shaft. The crank was not fastened to the shaft, but could be taken off and put on at pleasure. It required a man of ordinary strength at the time plaintiff was hurt to turn said crank in forcing the candles out of the moulds in said machine, they being filled with candles; that plaintiff was turning said crank and shaft at the time of his injury, for the purpose of raising the candles in

the moulds out of the same. The crank was fully on the tenon, which was worn smooth and somewhat tapering towards the end, and liable to slip off in operating the same, and there was some danger in using the same; that the crank and shaft were so worn at the time of plaintiff's injury, and a month prior thereto, that they did not fit closely together, such defects and want of repair herein found increased the danger attending the use of said machine; that the defects in said machine herein found, and failure to put said machine in proper condition were the direct cause of plaintiff's injury; that defendant had due notice and knowledge of said herein found defects and defective condition of said machine one week before said November 16, 1894, in ample time to have repaired said machine and remedied said defects before plaintiff's injury; that defendant, when complained to by plaintiff of said defects through one Bendle, representing it therein, promised plaintiff to remedy and repair said machine; and about a week before said injury plaintiff notified Charles J. McGregor of said defects, and he at the time promised to repair said tenon and said crank as soon as the order they were then filling was turned out; that said McGregor at said time had charge and superintendence over the entire candle factory of defendant, and the men employed therein; and at the time, and prior to said injury, said McGregor had occasionally employed and discharged servants of defendant in said factory, and it was his duty to see to and provide for repairing of the machinery of said candle factory. Said Bendle, at the time, and for six months prior thereto, was in the employ of defendant as foreman in said candle factory; that it was a part of said Bendle's duty, in his employment with defendant as such foreman, to inspect the machinery as to its condition, safety and state of

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repair, and to repair the same when out of order; that plaintiff was induced by said promise of repair to remain in defendant's service, and work with said machine until he was injured; that neither said Bendle nor said McGregor fulfilled their promises to repair said machine, and neither of them repaired the same, nor did the defendant so repair said machine; that on the said day, November 16, 1894, plaintiff, in the discharge of his duty, as aforesaid, was attempting to turn the crank on said shaft, and said crank slipped off the shaft, the same being fully on said shaft before it so slipped off, and by reason of it so slipping off plaintiff was thrown against and precipitated upon the sharp corner of a raised platform, then and there situated, fourteen inches in height, and a part of the structure of the room in which said machine was situated; that said fall sprained and ruptured the muscles of the left lumbar region of plaintiff's back, producing a partial paralysis of the left side of his body, injured his left kidney and producing hemorrhage of his intestines, and a muscular tumor in the muscles of the left side of his back, making it necessary that an operation be performed to remove the same, which was done; that plaintiff's spine was injured, and he is lame as a result of said injury; that another result of such injury, blood and puss pass from him with his urine and his excrement; that he has suffered, and now suffers pain resulting from said injury; that said injuries are permanent and unfit him for any kind of manual labor. Plaintiff was thirty-two years of age, strong, able-bodied, and active, and in good health prior to his injury, and earned \$3.00 a day, but his labor was not worth that much; that he incurred an indebtedness of \$200.00 in and about endeavoring to cure himself of said injuries; that he was damaged in the sum of \$5,000.00; that the danger in operating

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said crank and machinery was not imminent or probable, either at the time the promises to repair were made, or at the time plaintiff was injured.

Plaintiff had worked in said candle factory where he was hurt for three months prior to his being hurt, and was familiar with the manner of operating the machine No. 1 at the time his injury occurred. The condition of the machine No. 1, as it was when plaintiff's injury occurred, had existed one day prior thereto, as there was gradual wear, and the machine had been in substantially the same condition at the time plaintiff began operating it, with the exception of usual wear; and plaintiff learned of its condition in two weeks after he commenced operating it. The crank slipped off the end of the shaft while plaintiff was operating it, about two weeks before he was injured, and frequently so slipped off during the time plaintiff used it prior to his injury, and while so using it. A photograph of the crank on the shaft with a man holding the handle of the crank in his hands as if in the act of turning it, is made a part of the special verdict. From this it appears to be about the same in principle as the crank on a fanning mill, or a grind stone, or that of a modern cider mill. No amount of verbiage or multiplicity of words can obscure the fact that such a crank is made to slip on and off the shank at pleasure, and that in turning the shaft by hand any one with common sense must know that the power or pressure can be so applied as that the crank will stay on the tenon of the shaft, or that it can be so applied that it will work off.

That it is as simple as a hoe, an ax, a spade, or a ladder. There is no finding as to the manner in which appellee applied the pressure or power to the crank, or as to what care he used to prevent its slipping off, or what precaution he observed to avoid injury to him-



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self in case it should slip off. He knew it was liable to slip off, as the facts found show. Whether he was bound to anticipate injury to himself in case it did slip off is quite another question. The burden was on him to show that he was free from negligence contributing to his own injury. This burden he attempted to discharge by the following questions and answers in the special verdict: "Was the plaintiff in any wise at fault in acting in the premises as he did? Ans. No." "Did the plaintiff at all times exercise ordinary care under the circumstances? Ans. Yes."

This court, in *Pittsburgh, etc., R. W. Co. v. Adams*, 105 Ind. at p. 161, speaking of the special verdict in that case, said: "In the eleventh and fourteenth findings, it is stated that appellee received the injury without fault or negligence on his part.

"In the twelfth finding, it is stated that appellee exercised such care as might reasonably have been expected of him, considering his youth and inexperience.

"The fifteenth finding is, that appellant was careless and negligent in allowing the sliver or splint to remain and protrude from the rail. \* \* \* In each and all of these findings in relation to wrong and negligence on the part of appellant, the jury, instead of returning the facts and leaving it for the court to pronounce the law upon those facts, returned conclusions which embody conclusions of law. This they had no right to do, and hence all such conclusions must be disregarded; and hence there is nothing properly in the verdict showing that appellant was guilty of \* \* negligence, etc. \* \* \* It is apparent that the jury \* \* \* returned legal conclusions instead of facts. The verdict is therefore defective upon its face, and so defective that judgment cannot be rendered upon it." To the same effect are

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*Indianapolis, etc., R. W. Co. v. Bush*, 101 Ind. 582; *Indiana, etc., R. W. Co. v. Barnhart*, 115 Ind. 399; *Chicago, etc., R. W. Co. v. Burger*, 124 Ind. 275; *Board, etc., v. Bonebrake*, 146 Ind. 311, and cases there cited.

According to these authorities we would be justified in reversing the case on the sole ground that the special verdict fails to find facts showing that appellee was free from contributory negligence.

Appellee, however, has placed most of his reliance on the claim put forward, that the facts found bring him within the exception to the general rule that the employe who continues in the service of his employer after notice of a defect in machinery, tools or working place augmenting the danger of the service, assumes the risk as increased by the defect, the exception being that he does not assume such increased risk if the master expressly or impliedly promises to remedy the defect.

It may be conceded that such an agreement was found in the special verdict, and also that there was full notice of the defect. The promise of the master is the basis of the exception. *Indianapolis, etc., R. W. Co. v. Watson*, 114 Ind. 20-27, and authorities cited on latter page. The ground on which the exception rests is the inducement held out to, and influencing the servant by the master's agreement to repair. If he remains in the service of his master after knowledge of the danger, in the absence of a promise of the master to repair, he assumes the risk. *Indianapolis, etc., R. W. Co. v. Watson, supra*.

In case of such promise to repair by the master, relied upon by the servant, inducing him to remain in the service, the servant may recover for an injury caused by such defect, within such a period of time after the promise as would be reasonable to allow for such repairs to be made. *Corcoran v. Milwaukee, etc., Co.*, 81

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Wis. 191, 51 N. W. 328; *Indianapolis, etc., R. W. Co. v. Watson, supra*; *Jenny Electric, etc., Co. v. Murphy*, 115 Ind. 566; *Burns v. Windfall Mfg. Co.*, 146 Ind. 261.

But here the promise was not to repair generally, which would imply that it was to be done within a reasonable time. The promise was to repair as soon as the present order was run out. How long that would take, whether a week, thirty days, six months, or a year after the promise was made is not found in the special verdict. For aught that appears it may have required thirty days, or six months to run out that order. At the end of that time the promise was to repair. That being so, there could have been no inducement influencing the appellee to remain in the service and work with the alleged dangerous machine during that thirty days or six months, expecting the danger to be obviated as is the case where the promise is to repair generally implying it is to be done within a reasonable time. In *Indianapolis, etc., R. W. Co. v. Watson, supra*, it was said on page 30: "Now, if there had been a promise to furnish a lantern at the end of the thirty days, that would not relieve plaintiff from the risk incurred by working without a lantern for that thirty days, when, as he says, he had no expectation that a lantern would be furnished." So, in the case before us, there could be no expectation on the part of the appellee that any repairs were to be made during the time required to run out the order on which appellee was at work at the time the promise was made. And, hence, during that time whatever its length was, the promise would not relieve plaintiff from the risk incurred by working without such repairs. Therefore, if the plaintiff's injury occurred during the time required to run out that order, and before it was finished, the promise to repair did not relieve him from the risk

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incurred in working without the repairs. In other words, it left him as to risks from known dangers within that time as if no agreement to repair had been made, and that is that he assumed such risks. The time necessary to finish that order might have been, as already observed, thirty, or sixty days or even six months after the agreement to repair was made. The burden of showing that the appellee's injury occurred after the expiration of that time, and within a reasonable time thereafter for making the repairs was on the plaintiff, and the failure to find that the injury occurred after the order was finished and within such reasonable time thereafter must be held as a finding against him as to that point. *Helwig v. Beckner* (Ind. Sup.), 46 N. E. 644; *Burns v. Windfall Mfg. Co.*, *supra*.

But there is no finding here as to what repair was needed, or what repair would obviate the danger. Indeed there was no finding that any repair could possibly obviate the danger. The crank, like a hoe, an ax, a spade, a garden rake, or a ladder is very simple and free from ordinary danger, yet all these implements may be so used as to inflict injury on those who use them.

It has been held by this court that so simple a thing as a ladder is not subject to the exception to the general rule above stated whereby an agreement to repair it exonerates the servant from his implied assumption of the risks resulting from its known defects. *Meador v. Lake Shore, etc., R. W. Co.*, 138 Ind. 290.

Moreover, it is found that there was no probable danger from the use of the machine. It is held by this court that it is not negligence to fail to foresee and guard against a danger that is wholly improbable. *Wabash, etc., R. W. Co. v. Locke*, 112 Ind. 404.

The facts found in the special verdict are not suffi-

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cient to establish a cause of action and support the judgment.

The judgment is reversed, with instructions to render judgment upon the verdict in favor of the defendant.

BOARD OF COMMISSIONERS OF SWITZERLAND COUNTY  
v. REEVES ET AL.

[No. 18,096. Filed April 28, 1897. Rehearing denied October 8, 1897.]

**GRAVEL ROADS.—Construction.—Irregularities.—Injunction.**—The act of 1893, as amended by act of March 7, 1895 (Acts 1895, p. 143), providing for the construction of free gravel roads, confers upon the board of county commissioners judicial power, and mere irregularities in proceedings before such board of commissioners in proceedings to establish a free gravel road will not furnish any ground for an injunction. p. 471.

**SAME.—Tax Levy for.—Personal Notice.—Constitution Construed.**—The act of 1893, as amended by act of 1895 (Acts 1895, p. 143), providing for the levy of taxes on the taxable property of a township for the construction of free gravel roads without personal notice upon each taxpayer of such township, is not within the constitutional inhibition of taking property without due process of law. pp. 471, 472.

**SAME.—Bonds.—Not Debt of Township.—Constitution Construed.**—The debt created in the construction of free gravel roads under the provision of the act of 1893, as amended by act of 1895 (Acts 1895, p. 143), is not the debt of the township, and bonds issued for the payment therefor in a sum in excess of two per centum of the value of the taxable property within such township is not within the inhibition of article 13 of the constitution limiting the indebtedness of a political corporation to two per centum of the value of the taxable property therein. pp. 473-476.

**SAME.—Lands Taken for.—Compensation to Owner.**—Parties whose lands will not be appropriated for the construction of a free gravel road under the provision of the act of 1893 as amended by the act of 1895 (Acts 1895, p. 143), cannot invoke the provision of the state constitution prohibiting the taking of property without compensation, to defeat the construction of such road. p. 476.

**CONSTITUTIONAL LAW.—Amendments.**—The Supreme Court will not inquire into alleged irregularities in the passage of an act amending

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152	14
148	467
154	208
156	498
156	168
156	167
148	467
161	387

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the constitution, where it was duly authenticated by the proper officers of each house as having been agreed to by both houses. *pp.* 476, 477.

From the Switzerland Circuit Court. *Reversed.*

*George S. Pleasants, C. S. Tandy and F. M. Griffith,*  
for appellant.

*W. R. Johnston,* for appellees.

MCCABE, J.—The appellees sued the appellant to enjoin it from issuing bonds to build certain gravel roads in York township in Switzerland county. The defendants answered in confession and avoidance leading to issues of fact. The trial court overruled a demurrer to the complaint for want of sufficient facts, and sustained such a demurrer to the answer; and the defendants declining to plead further, judgment was rendered awarding the relief prayed in the complaint on the ruling sustaining the demurrer to the answer. The only action of the trial court called in question by the assignment of errors, is as to its rulings on the demurrers above mentioned. The substance of the complaint is: That on the — day of March, 1896, William H. Scott and other citizens and freeholders of York township, in said county, filed their petition before said board, praying said board to grant an order to submit to the voters of said township the question of building three free gravel roads, which was granted on said day; and said board ordered a special election to be held in said township on April 28, 1896, on the question of building said three roads; that notice was given of said election as required by the statute approved March 7, 1895; that said election was held pursuant to said statute, order, and notice, to determine the question by the legal voters whether the said three gravel roads, which are described, should be built; that said election resulted in a majority of the legal voters

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of said township voting for the construction of said proposed three gravel roads; that there was no vote authorized or voted at said election upon the question of building any one, or any two of said roads; but the only question voted upon at said election was whether or not all three of said proposed roads should be built; that the taxable value of the entire taxable property within said York township, as ascertained by the assessment last prior to said election, was \$417,000.00 and no more, which last assessment thereof was made for State and county taxation; that the indebtedness of said township immediately prior to said election exceeded, and now exceeds, the sum of \$8,424.33; that the cost of building said proposed free gravel roads, will, according to the estimate made by the proper authority, exceed \$20,000.00; that the estimate was made by three persons named, pursuant to the order of said board appointing and requiring them to make such estimate, upon the petition already mentioned; that if said free gravel roads are constructed, said township will thereby become indebted to an amount, in the aggregate, far exceeding two per centum of the value of taxable property within said township as ascertained by the last assessment for State and county taxes previous to the incurring of such indebtedness, contrary to article 13 of the constitution of Indiana; that the whole of the proceedings above mentioned have been and are conducted under and by virtue of the act of the General Assembly of this State, entitled "An act concerning the construction of free gravel, stone, or other macadamized roads," providing for their location, the manner of their construction, and providing for the payment of the same, and for their maintenance, and declaring an emergency, approved March 3, 1893, as amended by the act approved March 7, 1895, and by no other authority whatever; that one

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of said roads, if constructed, will run through the lands of eleven different owners named, a part of each of which tracts will be taken and appropriated for said proposed road by virtue of said act; but neither of the plaintiffs own any such lands; that said township is now indebted on account of bonds heretofore issued by said board for the building of other free gravel roads heretofore built, \$6,520.00; debt against the special school fund, \$184.60; debt against the township fund, \$719.73. That said township has on hand the following sums of money belonging to the several funds, to-wit: Dog tax fund, \$53.00; road fund, \$339.46; special school fund, \$516.11; township fund, \$580.71; total \$1,489.28. That there has been collected by the treasurer of said county the sum of \$594.26, which is applicable to the payment of the bonds above mentioned; that there is no money on hand or to the credit of said township applicable to the payment of the indebtedness about to be created, said township having no money on hand whatever except as above stated; that the construction of the two roads which are advertised to be let to bidders on the 20th of the present month will, according to the estimate of the viewers, cost \$11,238.23, and the other road named in said petition will according to said estimate cost \$10,260.57, and said roads will cost as much as said estimate; that said board has not yet advertised for bids for the construction of the third road named in said petition, but has continued the same; that unless restrained, said board will, on the day advertised, receive bids and enter into contracts for the construction of said two roads, and will issue bonds of said county for the purpose of raising money to pay for the construction of said roads, and will thereby incur an indebtedness against said township in a sum which, together with its existing indebtedness, will far exceed two per centum of the value of



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the taxable property within said township, as ascertained by the last assessment for State and county taxes. The plaintiffs are residents and taxpayers of said township, each owning property therein subject to taxation. Prayer for an injunction. The act of the legislature referred to, upon which the action of the board sought to be enjoined is founded, in the opinion of the writer, confers on the board nothing but ministerial or administrative authority, and does not clothe them with any judicial power or authority whatever. *Board, etc., v. Davis*, 136 Ind. 503; *Board, etc., v. State, ex rel.*, 147 Ind. 476; *Board, etc., v. Heaston*, 144 Ind. 583, and authorities there cited. Therefore, no question is presented by the demurrer to the complaint, in the opinion of the writer, as to a collateral attack upon judicial proceedings of the board of commissioners as appellees' counsel seem to suppose. But the majority of the court hold that the act does confer judicial power on the board of commissioners, and does require of them the exercise of judicial functions; and that if the board had jurisdiction of the subject and the parties, mere errors and irregularities in the proceedings would not furnish any ground for an injunction. *Stoddard v. Johnson*, 75 Ind. 20; *Ricketts v. Spraker*, 77 Ind. 371; *Million v. Board, etc.*, 89 Ind. 5; *Ely v. Board, etc.*, 112 Ind. 361; *Hobbs v. Board, etc.*, 116 Ind. 376; *Bowen v. Hester*, 143 Ind. 511.

Nor does the fact that the act under which the proceedings and election were held makes no provision for the service of a personal notice upon each taxpayer in the township bring the statute within the inhibition of the constitution, either state or federal, against taking property without due process of law. The act provides only for a special mode of levying taxes on the taxable property of the township for a

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public purpose. Such taxes may be levied without the personal presence of the tax payer. *McMillen v. Anderson*, 95 U. S. 37.

The act provides that the propriety of levying the tax and building the road or roads may be submitted to the legal voters of the township by the board, and provides for giving notice of such election through a newspaper of general circulation, published in the county, and posting up notices thereof at certain places; the latter being sufficient where there is no such paper in the county. This notice was given. If a majority of the votes cast are against the construction of the proposed road or roads, that is the end of the matter; and if a majority be for it, then the act provides that the board of commissioners shall at once proceed to construct the same. They are then required to issue and sell the bonds of the county with which to raise the money to pay therefor, precisely as is required in the act of 1877 and 1885, except under those acts the assessed benefits to the lands within two miles of the road are to be collected to pay the bonds; but under the act now in question a special tax is required to be levied on all the taxable property in the township to raise a fund to pay the bonds. The legislature could have empowered the board to levy the tax and build the road without submitting its propriety to the voters of the township. This feature of the act in no way infringes any constitutional limitation. Nor is the fact that three roads were voted for at once, and so submitted as that the voters must vote against or for all the roads, any objection to the validity of the election, because the amended second section expressly authorizes the propriety of the construction of more than one road to be submitted to the voters as a unit. See *Board, etc., v. Harrell*, 147 Ind. 500. Nor does this statutory provision infringe any

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constitutional provision. *Board, etc., v. Harrell, supra.* The principal contention of the appellees in support of the ruling of the trial court is that the bonds to be issued to raise the money with which to pay the estimated cost of the construction of the two roads which the board is about to issue and sell, will create an indebtedness against the township which, when added to that already existing against York township, will make a debt in excess of two per centum of the value of the taxable property within said township, in violation of the 13th article of the constitution. But if the rule laid down in *Board, etc., Harrell, supra*, is to stand as the law upon the point now under discussion, then such contention cannot be maintained. Because it was there directly decided that the debt thus created is not the debt of the township, and hence no infringement of said article of the constitution which only inhibits the creation of a debt of a political or municipal corporation in excess of two per centum on the taxable property within such corporation. The writer hereof is of opinion that that case is wrongly decided on that point. The following case is cited in that opinion to the point that bonds issued by a city to raise funds to pay for the construction of certain street improvements, the cost of which is assessed against the abutting property, is not a debt of the city, to-wit: *Quill v. City of Indianapolis*, 124 Ind. 292. And the following list of cases is also cited in the Harrell case to the point that bonds issued by the board of commissioners to build gravel roads under the other free gravel road acts, similar in this respect to the one now in question, do not constitute a debt of the county, namely: *Strieb v. Cox*, 111 Ind. 299; *Burton v. State*, 111 Ind. 600; *Board, etc., v. Fullen*, 111 Ind. 410; *Board, etc., v. Hill*, 115 Ind. 316; *Board, etc., v. Fullen*, 118 Ind. 158; *Board, etc., v. Fahlor*, 114 Ind. 176;

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*Spidell v. Johnson*, 128 Ind. 235; *Gavin v. Board, etc.*, 104 Ind. 201; *Little v. Board, etc.*, 7 Ind. App. 118; *Walker v. Board, etc.*, 11 Ind. App. 285; *Braun v. Board, etc.*, 17 C. C. A. 166, 70 Fed. 369.

This ought to be sufficient to establish that such bonds in this class of cases are not the debt of the city in the one case, or the county in the other. If they are not the debt of the county, and not the debt of the township as is held in the case referred to, doubtless, in the opinion of the writer, the taxpayers of York township will always feel a lively interest in knowing whose debt they are, or will be if issued and sold. It will hardly do to say, in the opinion of the writer, that they will be nobody's debt. And it is just as easy, in his opinion, and far more reasonable to say that they will be the debt of York township, as it is to say that they will be the debt of the several taxpayers of York township. Indeed, it is, in his opinion, impossible to say with reason that such bonds would constitute the debt of the several taxpayers of the township, because, when they have paid the special tax assessed against their property on account of said bonds, they will have discharged every obligation resting on them on account of said bonds, and yet the bonds would not be paid. The question whose debt would the bonds be, if not that of the township, remains unanswered, in the opinion of the writer. While the bonds would in form be the debt of the county, yet in substance, law, and in fact, they would not be the debt of the county, as the decisions of this court fully establish. In substance, though not in form, they would, in his opinion, be the debt of the township. They would, in his opinion, be the debt of the township in substance, as much as if the political corporation of the township had issued and sold them, and its officers had levied a tax upon the taxable property of the township to raise

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money to pay them. The fact that the statute authorizes other officers to issue the bonds, no matter in whose name, and to raise money to pay them by levying a tax on the taxable property of the township, in the opinion of the writer, makes only a difference in form, not in substance. This was a suit in equity. As was said in *Board, etc., v. Gwin*, 136 Ind. at p. 582: "Equity looks at the intent rather than the form; it always attempts to get at the substance of things, and to ascertain, uphold, and enforce rights which spring from the real relations of parties. It will never suffer the mere appearance and external form to conceal the true purposes, objects, and consequences of a transaction."

In form, the bonds would be the debt of the county, but in substance, as we have seen, they would not, but would, in the opinion of the writer, be the debt of the township. A court of equity always looks through and disregards mere forms, to the substance of things. If that were not so, in the opinion of the writer, the legislature may in every instance evade the 13th article of the constitution and make it practically a dead letter. To accomplish that result, whenever it deems it desirable that a political or municipal corporation should become indebted in excess of the limit prescribed in that article, all that would be necessary to do so, in the opinion of the writer, would be to enact a statute authorizing the board of commissioners to issue and sell bonds in the name of the county, and levy a tax upon the taxable property within the political or municipal corporation to pay the bonds. Thus, this constitutional barrier, in the opinion of the writer, can, in every conceivable instance, be evaded by the legislature, if the act now under discussion does not fall within its purview.

But the majority of the court are of opinion that the

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act does not fall within the purview of the 13th article of the constitution, because the bonds about to be issued and sold under it will not, when so issued and sold, be the debt of York township, and that the case of the *Board, etc., v. Harrell, supra*, was correctly decided upon this point, and adhere to it. On the authority of that case it must be held that the bonds, the issue and sale of which are enjoined by the judgment and decree of the trial court, would not constitute, if issued and sold, a debt of York township, and therefore do not fall within the inhibition of article 13 of the constitution.

The appellees also seek to uphold the ruling of the trial court by contending that the act in question is unconstitutional in authorizing the construction of the gravel roads without notice to the property owners. But we have seen that such contention cannot be maintained. The act provides for notice of the election, as we have seen, which is the initiative step in the whole proceeding. The power involved is the power of taxation for a public purpose. The exercise of this power could have been authorized by the legislature without any notice.

Another objection to the constitutionality of the act made by appellees is that it nowhere provides for compensation of the owners of lands over which the roads are to pass, where it is a new road. But it is a sufficient answer to this contention to say, that none of the plaintiffs are claiming that any of their lands have been or will be appropriated if either or all of the proposed roads are built. As long as the constitutional objection urged does not affect appellees' rights, they cannot invoke the power of the court to pass on it. *Henderson, Auditor, v. State, ex rel.*, 137 Ind. 552.

The appellant, however, vigorously contends that article 13 of the constitution was not adopted accord-

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ing to the forms prescribed in the constitution for its own amendment. The contention is that when in the form of a resolution proposing an amendment to the constitution, it was defeated in the house, when being considered by the second legislature, the body to which it had been referred by the previous legislature. But it is not denied that the proper officers of each house, preliminary to the submission of the article to the voters of the State, had duly authenticated the same as having been agreed to by both houses. This court, under such circumstances, refused to inquire into the fact alleged, that the article had not been agreed to by both houses, in *Brashear v. City of Madison*, 142 Ind. 685, 691, especially as a majority of the voters of the State voted for said article.

It follows from what we have said that the circuit court erred in overruling the demurrer to the complaint, for which error the judgment must be reversed, while the writer is of opinion that the judgment ought to be affirmed.

The judgment is therefore reversed, with instructions to the trial court to sustain the demurrer to the complaint.

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BULLERDICK v. WRIGHT.

[No. 17,872. Filed October 12, 1897.]

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**WILLS.—Devise.—Power to Convey.**—A widow, by the terms of her husband's will, was invested with a life estate in certain lands, coupled with the power of fully disposing of the fee by devise or bequest if she so desired. After her husband's estate had been fully settled she executed her will making a number of bequests for specified amounts, referring to the property disposed of as "my property," and "my estate," and in the preamble of her will made the statement that she made her will "in pursuance of, and more fully to carry out the provisions of the will of my late husband."

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*Held*, that the testatrix, by the recitals in the preamble of her will fully indicated her intent and purpose to carry into execution the power conferred upon her by the will of her husband.

From the Wayne Circuit Court. *Reversed*.

*C. E. Shively and T. J. Study*, for appellant.

*H. C. Fox and A. L. Study*, for appellee. :

JORDAN, J.—This action was successfully prosecuted in the lower court by the appellee Benjamin F. Wright to set aside an executor's sale, and the deed of conveyance executed thereunder to appellant for the real estate described in the complaint, and to quiet appellee's title.

Appellant by this appeal seeks to have reviewed the action of the trial court in rendering judgment upon the facts in favor of appellee.

The facts most material to the consideration of the question involved are the following: Jonas L. Stidham died testate in Wayne county, Indiana, on October, 25, 1888, the owner in fee of the real estate in dispute, the same being a tract of eighty-nine acres situated in said county. Said Stidham died without children, but left surviving him Elizabeth Stidham as his widow. On August 20, 1885, he duly executed his last will and testament, of which the following, omitting the attesting clause, is a copy: "I, Jonas L. Stidham, of Wayne county, in the State of Indiana, being of sound mind and memory, do make and publish this my last will and testament, hereby revoking all other wills by me heretofore made. *First*, I direct that all my just debts and funeral expenses be paid; *second*, I give and bequeath to Susan J. Wright, daughter of David P. Grave, the sum of \$2,000.00; *third*, all the residue of my estate, real and personal, I give and devise and bequeath to my wife, in case she survives me, to



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have and to hold for and during her natural life; *fourth*, in case my wife does not survive me, I give, devise and bequeath to said Susan J. Wright, all my estate, real and personal; *fifth*, in case my said wife, Elizabeth Stidham, survives me, I nominate and appoint her to be the executrix of this will, and especially will and direct that she shall not be required to give any bond for the discharge of her duty as executrix; and that she shall have the control and management, custody and possession of the residue of my estate, devised to her by item three of this will, during her said life; *sixth*, I hereby empower my said wife, in case she survives me, to dispose of by deed, gift, devise, or bequest any part of or all of the estate devised to her by this will; it being my intention that she shall have absolute control and right of disposition thereof; and that such part thereof as shall not have been disposed of by her, shall go to said Susan J. Wright.

“In witness whereof, I have hereunto set my hand and seal this, the 20th day of August, 1885. (Signed). Jonas L. Stidham.”

Mrs. Stidham elected to accept the provisions made for her in her husband's will.

Susan J. Wright, mentioned in the will of Jonas L., and to whom he devised the legacy of \$2,000.00, together with that part of his estate not disposed of by his surviving wife, died in Wayne county, Indiana, on the 22d day of January, 1892, without children, mother or father surviving her, but left appellee as her surviving husband and only heir. Susan J. Wright was a niece of Elizabeth Stidham, the widow of Jonas L., and the appellee was her cousin.

On April 7, 1892, said Elizabeth Stidham executed her last will and testament, of which the following, omitting the attesting clause, is a copy: “In the name of our Heavenly Father, I, Elizabeth Stidham, of

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Wayne county, Indiana, of sound and disposing mind, do hereby make this my last will and testament in pursuance of, and to more fully carry out the provisions of the last will of my late husband, Jonas L. Stidham, who died at Wayne county, Indiana. *Item first*, I direct first that all my just debts and funeral expenses be paid; *item second*, I will and give to Emma White, formerly Sheridan, Elmyra Kinley, formerly Sheridan, Albert Sheridan, and Susan Mitchell, each one. \$125.00; *item third*, I will and give to Lizzie Edmonson \$500.00, to Allen W. Grave \$500.00, and to Jonas L. Frist and Eliza Jane Wolverton, each, \$100.00; *item four*, should there be any balance left of my estate after such legacies are paid, I will, give and bequeath and devise all of said balance of my property to said Lizzie Edmonson and Allen W. Grave, share and share alike; *item five*, should my estate not be sufficient to pay all of such legacies, then I direct that said legacies shall not be paid in full, nor in the order named, but in proportion that each legacy bears to the other and to the whole estate, that is, my executor shall pay such legacies pro rata; *item six*, I name and nominate my friend, James G. Martin, of the City of Richmond, in said county, the executor of this my last will and testament; *item seven*, I hereby cancel and revoke all former wills or will by me made.

"In witness whereof, I, said testator, have hereunto set my hand on this 7th day of April, 1892. (Signed.) Elizabeth Stidham."

On May 18, 1893, she duly executed the following codicil to her will:

"Whereas, I, Elizabeth Stidham, on the 7th day of April, 1892, made my last will and testament, I do hereby declare the following to be a codicil to the same:

"Whereas Lizzie Edmonson, to whom I willed and

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bequeathed part of my said property, has died since I made my last will, I now direct, will and bequeath all of my said property and estate shall go to Minnie G. Martin, wife of James G. Martin, that I willed and bequeathed to said Lizzie Edmonson, now deceased.

"In witness whereof, I have hereunto set my hand this 18th day of May, 1893. (Signed.) Elizabeth Stidham."

March 8, 1894, she duly executed the following codicil: "Whereas, I, Elizabeth Stidham, on the 7th day of April, 1892, made my last will and testament of that date, I do hereby declare this to be a second codicil to the same: *First*, I give, will and devise to Mary Jane Lyman, my departed husband's sister, \$400.00; *second*, to Lewis A. Stidham, my husband's brother, I will, devise and give, \$400.00; *third*, to Rachel Maddock, of the city of Richmond, Indiana, I will, devise and give, \$150.00; *fourth*, to Allen Hawkins I will, devise and give, \$150.00; *fifth*, to George Hawkins I give, will and devise, \$100.00.

"In witness whereof I have hereunto set my hand this 8th day of March, 1894. (Signed.) Elizabeth Stidham."

Appellee administered upon the estate of Jonas L. Stidham under the will, in the Wayne Circuit Court, and after paying the legacy of two thousand dollars, bequeathed to his said wife, and all other claims against the estate, made a final settlement on December 23d, 1889, and the estate on said day was adjudged by the court to be finally settled, and he was discharged from his said trust.

Mrs. Elizabeth Stidham died on September 9, 1894. James G. Martin, the executor of Mrs. Stidham's will, duly qualified as such on September 14th, 1894, and on December 27th of the same year, he, on petition,

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secured an order of the Wayne Circuit Court for the sale of the lands in question, and under said order, he, as such executor, sold at private sale, and conveyed the real estate to the appellant, Henry C. Bullerdick, for \$5,300.00, all of which was approved by the court. It is through this sale and conveyance that appellant claims title to the real estate. Appellee was not a party to the proceedings instituted by the executor to sell the land, but all the legatees named in the will and its codicils were made parties thereto.

The cardinal question involved and presented for our decision is: Was there a sufficient indication of the intention on the part of Elizabeth Stidham to execute the power of disposition, of the fee simple of the land in question, as invested in her by the will of her husband, Jonas L. Stidham? If this question, under the facts, can be answered in the affirmative, it is virtually conceded by counsel for appellee that appellant is the owner in fee of the premises, and therefore the judgment below is wrong and must be reversed. The proposition in controversy has been very ably argued, *pro* and *con*, by the learned counsel representing the respective parties, and voluminous briefs, citing many authorities, have been prepared and presented to the court.

There is no controversy but what Mrs. Stidham, under her husband's will, was invested with a life estate in these lands, coupled with the power of fully disposing of the fee, by devise or bequest, if she so desired. But at this point the lines of concession of the parties diverge, and, while it is insisted by counsel for appellant that the declarations or recitals of Mrs. Stidham in the preamble to her will sufficiently refer to the power, fully indicate that she intended to and did exercise the same, and thereby authorized the sale of the real estate for the payment of the legacies pro-

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vided in her will and its codicils, and also for the payment of other claims against her estate, counsel for appellee, with equal earnestness, urge that no such intention is shown. They claim that in consideration of the fact that she did not use the word "power" in the preamble, and in view of the further fact that she employed the words "my estate" and "my property" prove that she intended the legacies to be paid wholly out of the property of which she was the absolute owner, and that it cannot be said that she intended that her will should apply to the premises in question, in which she only had a life estate coupled with the power of disposition.

The guiding rule prescribed by the authorities, from Blackstone down to the present time, for the interpretation of wills, is, that the intention of the testator as the same is disclosed by the entire will must prevail, when such intention is not inconsistent with the settled rules of law. Where a testator has been vested with the power of disposition over property, the authorities give three classes of cases as affording sufficient proof of the intent of the testator to execute such power. *First*, where he refers to, or recites the power in his will; *second*, where the property or thing or fund subject to be disposed of under the power is described; *third*, where the will would be inoperative without acting on the property over which the testator is given the power of appointment. While these illustrations do not afford the only proof, they are, however, considered as furnishing clear and unequivocal proof of the intention of the testator to exercise the power. The authorities uniformly affirm the doctrine that it is not essential to refer in express terms to the power, if an intention to execute it otherwise plainly appears, and any words or expressions indicating an intention to exercise the power will operate to

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that effect. The following are some of the many authorities supporting the above propositions: *Nowell v. Roake*, 2 Bing. 497; *Maddison v. Andrew*, 1 Vesey, Sr., 57; *Blagge v. Miles*, 1 Story 426; *Amory v. Meredith*, 7 Allen 397; *White v. Hicks*, 33 N. Y. 383; *Andrews v. Brumfield*, 32 Miss. 107; 4 Kent. Comm. 334; 1 Redfield on Wills, 271; 1 Sugden on Powers, section 2, p. 294; *Cooper v. Haines*, 70 Md. 282, 17 Atl. 79; *Lex v. Simpson*, 134 U. S. 572; 18 Am. & Eng. Ency. of Law, p. 938; *South v. South*, 91 Ind. 221. In this last decision many of the leading cases upon the question are collected and considered.

Guided by the light of these well settled principles, we may proceed to examine the facts relative to the question presented for our consideration. At the beginning of the will in controversy it is disclosed that the testatrix makes it "*in pursuance of and more fully to carry out the provisions of the last will of my late husband Jonas L. Stidham, who died at Wayne county, Indiana.*" She by this declaration expressly professes to execute her will in pursuance of that of her husband (which, as we have seen, vested her with the power in question), and to more fully carry out its provisions. Considering these recitals, can it in reason be said that she had no reference to the power of appointment given her by the will of Jonas L. Stidham, and indicated no intention of having her will applied to and operate upon the real estate in controversy? We are of the opinion that this question must necessarily be answered in the negative. We are confirmed in this conclusion by the fact shown by the evidence that the estate of her husband under his will had been finally settled, and all claims and legacies paid, more than two years before the execution of Mrs. Stidham's will. The inquiry naturally arises, what provisions of her husband's will remained to be

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“more fully” carried out by her, or any other person? None whatever, except the provisions therein which gave her the right to dispose of by deed or devise any or all the property given to her under item three. Again, Susan J. Wright, who, under the provisions of Jonas Stidham’s will, was to have all of the estate devised to his wife, undisposed of at the death of the latter, had died prior to the execution of the will, and therefore could not be benefited by the act of her aunt, Mrs. Stidham, in omitting to dispose of this property. This fact may be considered as tending to show why the latter desired to make a disposition thereof, and give, as she did, the benefit of the property, in part, to those of her husband’s blood. To assert, under the circumstances, that the statement made by Mrs. Stidham in her will, in effect, that she executed it in pursuance of that of her late husband, and more fully to carry out its provisions, can have no reference to the power conferred upon her by his will, and that she did not intend to exercise the same and thereby subject the land to the operation of her will, would involve her in the absurdity of referring to his will for an idle and meaningless purpose, and such absurdity, in view of the facts, we cannot impute to her. If, as urged by counsel for appellee, the testatrix only intended to dispose of the property owned by her absolutely at the date of her death, why did she deem it essential to refer to the will of Jonas Stidham, and express a desire to carry out its provisions? We must presume that she knew that her power to dispose of her own property did not rest upon the provisions of his will, but was vested in her by virtue of law. In the case of *Lee v. Simpson, supra*, the testatrix was given by her mother’s will a life interest in a part of a mortgage bond, coupled also with a power to dispose of the same by her last will and testament. The daughter,

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who was married at the time she executed her will, recited therein that she was entitled to legacies under her mother's will, and declared that, "notwithstanding my coverture, I have full testamentary power to dispose of the same," and then bequeathed to her husband her entire property. The material question involved in that appeal was whether the testatrix, Mrs. Clemson, had by her will, exercised the power given her to devise the mortgage debt. The contention there was that the recital in the will of Mrs. Clemson, that notwithstanding her coverture she had full testamentary power to dispose of the legacies of which mention had been made, had reference only to the fact that shortly before the execution of the will married women in South Carolina had been authorized to dispose of their property by will. The court, however, said that the recital was a direct and express reference by the testatrix to the power conferred upon her by her mother's will, because at the time of the execution of her will, under the laws of that state, Mrs. Clemson could have disposed of any property which she had, other than that which came to her under her mother's will, without invoking the aid of any special power to do so. Much stress is laid by counsel for appellee on the fact that Mrs. Stidham, as heretofore stated, did not expressly employ in her declarations the word "power," and that she used in her will the words "my estate" and "my property." This, they contend, is indicative that she intended to limit the operation of her will to her own individual estate. There is no force in this insistence. As we have heretofore said, any words or expressions indicating an intention to exercise the power will suffice, and it is not indispensable that the word power be used. She had the use and control of this real estate, and the income therefrom during her life, and the right to dispose of



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the fee if she chose to do so; under such circumstances a person would naturally speak of it as his or her property. When she referred in the will to her property or estate, she must be understood, in view of these facts, to have meant any property subject to her disposal. We think that Mrs. Stidham's intention to execute the power in question is so clearly disclosed or manifested that no other can be imputed to her, and this brings the case well within the doctrine asserted by the authorities. We have examined the many authorities cited in behalf of the appellee, but when applied to the particular facts in this case, they do not support his claim, nor the theory advanced by him.

Applying the well settled principles of the law to the facts, and the conclusion is irresistible that the testatrix fully indicated by the declarations in the will her intent and purpose to carry into execution the power conferred upon her; and therefore the land in dispute was subject to the operation of the will.

We must adjudge that the appellant, through the sale and conveyance in question, acquired a valid title, in fee simple, to the real estate. The judgment of the lower court is in all things reversed, and the cause remanded, with instructions to that court to grant the appellant a new trial, and for further proceedings in accordance with this opinion.

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TRAMMEL *v.* TRAMMEL ET AL.

[No. 18,081. Filed October 12, 1897.]

**WILLS.—Construction.—Advancements.**—Where a testator provides in his will that in the event of the death of one of the beneficiaries therein named before arriving at the age of twenty-one, that his property shall descend the same as if no will had been made, upon the death of such beneficiary, testator's property will descend in same manner as though he had died intestate, and advancements made by testator will be taken into account in the division of such estate.

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Trammel v. Trammel et al.

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From the Huntington Circuit Court. *Affirmed.*

*T. L. Lucas and C. K. Lucas*, for appellant.

*James C. Branyan and John S. Branyan*, for appellees.

MONKS, J.—Appellant brought this action for partition of real estate.

In 1890 John M. Trammel conveyed by deed to appellant, his son, forty acres of real estate as an advancement. At that time John M. Trammel owned 120 acres of land besides that conveyed, and had two children living, appellant, and John A. Trammel, and a grandchild, the appellee, Clell A. Trammel, the son of his son Thomas A. Trammel, deceased. John M. Trammel died in 1894, leaving a will, which was duly admitted to probate. He owned said 120 acres of real estate, and personal property of the value of \$500.00 at the time of his death. By said will he devised said 120 acres of land to his son John A. Trammel, upon condition that he pay to appellee, Clell A. Trammel, \$800.00 when he, said Clell A., should arrive at the age of twenty-one years; and provided further, that said John A. Trammel, who was a minor, should live until he was twenty-one years of age. And if said John A. Trammel should die before arriving at the age of twenty-one years, then it was provided that the whole estate should descend to the heirs of John M. Trammel the same in all respects as if no will or devise had been made. The personal property was not disposed of by said will, nor did the same contain any other provision than that as above set forth.

John A. Trammel died intestate in 1895, before he had arrived at the age of twenty-one years.

Appellant claims that he is entitled to the undivided one-half in value of said 120 acres of real estate,

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while appellees contend that in the partition of said real estate appellant must be charged with the value of the forty acres conveyed to him in 1890, as an advancement. The court below held the law to be as insisted by appellees, and rendered judgment accordingly.

We think the law as held by the trial court was correct.

It is true that when a will is made, all previous advancements are extinguished, unless the same are saved by the will; and this is held upon the ground that the testator has graduated his legacies with reference to such prior advancements. *Jones v. Richardson*, 46 Mass. 247.

In this case, however, the testator provided that if his son John A. Trammel did not live until he was twenty-one years of age, that his estate should descend the same as if no will or devise had been made. If said will had not been made, and John M. Trammel had died intestate leaving appellant, his son, and appellee, the son of a deceased son, as his only heirs, the law would require that the value of the forty acres conveyed to appellant in 1890 be taken into account and charged to appellant in the partition of the 120 acres of real estate involved in this action. When a testator provides that his property shall descend the same as if no will had been made, that is, as though he had died intestate, prior advancements are to be taken into account in the division of his estate. *Raiford v. Raiford*, 6 Ired. Eq. (N. Car.) 490; *Stewart v. Stewart*, 15 Ch. Div. 539, 544.

It was clearly the intention of the testator that, under the conditions as they exist, the right of appellant and appellees in his estate should be the same as if he had survived his son, John A. Trammel, and had

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died intestate. The trial court adopted this view and so adjusted the rights of the parties.

There being no error in the record, judgment affirmed.

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THE OLD NATIONAL BANK OF EVANSVILLE ET AL.  
v. HECKMAN ET AL.

[No. 18,151. Filed October 12, 1897.]

148	490
155	684
148	490
157	651
148	490
159	619
148	490
166	628

**MORTGAGES.**—*When First Mortgage may be Attacked for Fraud by Junior Mortgagee.*—Where a junior mortgage recites that it is subject to a prior mortgage, the mortgagee of such junior mortgage cannot in an action to foreclose assail the prior mortgage as fraudulent; but if the junior mortgagee abandons his mortgage, he may attack the prior mortgage for fraud. pp. 508, 509.

**FRAUDULENT CONVEYANCE.**—*When Creditor Cannot Avail Himself of the Fraud of Debtor.*—A creditor cannot avail himself of a fraudulent conveyance by his debtor where all the property is conveyed to another who assumes the debt. p. 510, 511.

**PARTNERSHIP.**—*May Pay or Secure Bona Fide Debts of Individual Partners.*—Partners may waive the right to compel partnership assets to be first applied to the payment of partnership debts, and they may transfer or incumber the firm property to pay or secure bona fide debts of the individual members of the firm, and the transaction cannot be successfully attacked, either by a creditor or a receiver appointed by reason of the insolvency of the firm. pp. 511, 512.

**SPECIAL FINDINGS.**—*Conclusions of Law Improperly Stated Among Facts Found.*—The conclusions of law stated among the facts found are void and amount to nothing. p. 512.

From the Vanderburgh Superior Court. *Reversed.*

*Alex. Gilchrist, C. A. De Bruler and C. L. Wedding,*  
for appellants.

*John Brownlee and P. W. Frey,* for appellees.

**MCCABE, C. J.**—This suit was brought by the appellees Rosine Heckman, Elizabeth Weinheimer, Rose Kretpke and Philip W. Frey, against the appellant,

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The Old National Bank of Evansville, and against the appellee, The Indiana Pottery Company, to foreclose a mortgage given by the Indiana Pottery Company to the other appellees.

The issues formed were tried by the court, resulting in special finding of the facts on which the court stated its conclusions of law favorable to the appellees, and rendered judgment accordingly.

The substance of the special finding is as follows: The plaintiffs, Rose Kreipke and Elizabeth Weinheimer, are both daughters of the plaintiff Rosine Heckman, and are the wives of William Kreipke and Louis Weinheimer respectively. Prior to the year 1892, the plaintiff, Rose Kreipke, loaned said William Kreipke the sum of \$1,650.00, and afterwards she loaned him the further sum of \$1,350.00, and took his note for the sum of \$3,000.00; that with the proceeds of said loan he purchased real estate on Main street in the city of Evansville; that he afterwards sold said real estate, and with the proceeds of said sale he purchased stock in the Uhl Pottery Company; that the plaintiff, Elizabeth Weinheimer, in 1888 loaned Louis Weinheimer, her husband, the sum of \$1,600.00 and took his note for that amount; that he purchased stock in the Old National Bank with the proceeds of said loan, and that afterwards he sold said bank stock, and with the proceeds of such sale he purchased stock in the Uhl Pottery Company; that at the time of said purchase he borrowed from the plaintiff, Elizabeth Weinheimer, the further sum of \$1,400.00, and with the proceeds of said loan purchased stock in the Uhl Pottery Company; that at the time he borrowed said sum of \$1,400.00 from her, he took up the note for \$1,600.00 and gave her his note for \$3,000.00. No part of either of these sums have been paid by the said Kreipke and Weinheimer to their wives. After

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giving the note for \$3,000.00, and while he was solvent, said Kreipke built a house for the plaintiff, Rose Kreipke, on her real estate, at the cost of \$1,200.00, which he donated to her.

On and before the 25th of December, 1893. the Uhl Pottery Company was a corporation organized under the statutes of this State providing for the incorporation of manufacturing and mining companies. It had an authorized capital of \$25,000.00. It was organized in 1891, and its term of existence was ten years, its place of business was Evansville, and its object of formation, as stated in its articles of association, was the manufacture and sale of pottery and similar goods. At the date above mentioned it had but three stockholders, namely: Louis Weinheimer, William H. Kreipke and one Arthur W. Blackman, said Weinheimer and Kreipke having each stock in said company of the par value of \$5,000.00, and said Blackman having stock in said company of the par value of \$1,000.00, which he at the time of the conveyance next mentioned sold to said Weinheimer and Kreipke for \$250.00. The only directors of said company at said date were said Louis Weinheimer, William H. Kreipke and said Blackman.

On said 23d day of December, 1893, a conveyance was made of all the property of the Uhl Pottery Company to said Louis Weinheimer and William H. Kreipke. Said deed was made in the name of the Uhl Pottery Company, and was executed by said Kreipke as president of said company, and by said Weinheimer as secretary of said company, to themselves as individuals. At once upon the transfer of all property of the Uhl Pottery Company to themselves, as hereinbefore stated, said Weinheimer and Kreipke began and continued the same kind of business that said Uhl Pottery Company had been engaged in as partners, under

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the name of The Indiana Pottery Company, using in said business the plant and all other property of said Uhl Pottery Company. Shortly after said 23d day of December, 1893, said firm of Weinheimer and Kreipke, by the name of The Indiana Pottery Company, assumed the said indebtedness of the individual members of said firm to their wives, and gave a note of said firm to the plaintiff, Elizabeth Weinheimer, of \$3,000.00, and to the plaintiff, Rose Kreipke, of \$3,000.00. Neither said Uhl Pottery Company, nor said firm of Weinheimer and Kreipke at said time, nor at any other time, were indebted to either of said plaintiffs in any sum whatever, and the only consideration for the assumption of said indebtedness and the giving of their said notes was the fact, as herein stated, that each of said husbands owed his wife. Said Weinheimer and Kreipke conducted said business under said name of The Indiana Pottery Company until the 3d day of October, 1894, when they, with their brother-in-law, Louis Heckman, filed articles of association under the law providing for the incorporation of manufacturing and mining companies, and formed a corporation under the same name of The Indiana Pottery Company with a capital stock of \$25,000.00, and term of existence of fifty years, with their place of business at Evansville, Indiana, and to carry on the same kind of business as had been carried on by said Uhl Pottery Company. There were but three incorporators, namely: said Louis Weinheimer, William H. Kreipke and Louis Heckman, said Weinheimer and Kreipke taking each one hundred shares of \$50.00 each of the capital stock of said new corporation, and said Louis Heckman one share, said individuals being the sole stockholders and only directors of said company. At once upon the organization of said company, said Louis Weinheimer and William Kreipke

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made a deed to said new company, in which their wives joined, of all the real estate which had been transferred from said Uhl Pottery Company to said Weinheimer and Kreipke, including the plant of said Uhl Pottery Company; and they also made a bill of sale to said new corporation of all the other assets of said firm of Weinheimer and Kreipke, which included all they had received from said Uhl Pottery Company.

Said Weinheimer and Kreipke, upon such conveyance and transfer, caused said Indiana Pottery Company to enter on its minutes an agreement to assume the debts of said Weinheimer and Kreipke and they caused said Indiana Pottery Company, as a corporation, to execute and deliver to the said Elizabeth Weinheimer and to said Rose Kreipke, each of them, a note for \$3,000.00 in lieu of the notes of said Weinheimer and Kreipke held by said plaintiffs, which were by the said plaintiffs surrendered to the said Weinheimer and Kreipke; at the same time said Weinheimer and Kreipke caused said corporation, The Indiana Pottery Company, to execute and deliver to the plaintiff, Rosine Heckman, a note for \$6,000.00 which note, as hereinafter shown, was without consideration, except for the sum of \$2,000.00.

Said Weinheimer and Kreipke, and said Louis Heckman, paid nothing for the stock so taken by them in said new corporation, except by the transfer of said plant and other property to said corporation; that on September 27th, 1894, said firm of Weinheimer and Kreipke, doing business under the name of the Indiana Pottery Company, borrowed from the plaintiff, Rosine Heckman, the sum of \$2,000.00; that on said last mentioned date the said firm executed and delivered to the plaintiff Rosine Heckman its note for the sum of \$6,000.00; that said note was without consideration, except the sum of \$2,000.00 borrowed as



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aforesaid. On April 20, 1895, the defendant, The Old National Bank, recovered a judgment in the Vanderburgh Superior Court for \$10,302.03 against said Indiana Pottery Company, and against said Louis Weinheimer and William H. Kreipke, who were makers with the Indiana Pottery Company of the notes on which said judgment was recovered; that execution was thereafter issued on said judgment to the sheriff of Vanderburgh county, the residence of each of the defendants in said judgment, and said execution was thereafter returned wholly unsatisfied. Neither at said date, nor at any time, was there any property out of which said judgment could be made, except the property included in the mortgage to plaintiffs, and said judgment is wholly unpaid, and there is now due thereon the sum of \$11,062.40.

On April 20, 1895, defendant, David Ingle, recovered a judgment in said court for \$361.80 against said Indiana Pottery Company, which is wholly unpaid. Execution was thereafter issued to said sheriff of Vanderburgh county upon said judgment, and was returned wholly unsatisfied, for the reason that there was no property out of which to make the same except the property included in plaintiffs' mortgage. The debt upon which said last named judgment was recovered was created after the transfer of the property of the Uhl Pottery Company to said Weinheimer and Kreipke, and that there is now due thereon the sum of \$388.20. At the time the mortgage was made to the plaintiffs the Indiana Pottery Company was insolvent. The value of its assets at said time was not to exceed \$12,000.00, and if the notes of said company given to the plaintiffs were valid, the debts were more than \$21,000.00. At the time the corporation, The Indiana Pottery Company was organized; if the alleged debts of Weinheimer and Kreipke to the plaintiffs are

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counted as valid debts, said Weinheimer and Kreipke were insolvent, and the property transferred to the new corporation was not sufficient to pay the debts of Weinheimer and Kreipke assumed by it. At the time the property of the Uhl Pottery Company was transferred to Weinheimer and Kreipke, as hereinbefore stated, the Uhl Pottery Company had property enough to pay the debts of said company, but the assumption of the debts of Weinheimer and Kreipke to their wives made that property insufficient to pay the debts to which it was made subject, and caused said firm of Weinheimer and Kreipke to become insolvent.

Of the debt upon which the judgment of the Old National Bank was recovered, \$7,200.00 was the debt of the Uhl Pottery Company, existing on December 23, 1893, and \$2,500.00 of the same was created by Weinheimer and Kreipke after the transfer of the property of the Uhl Pottery Company to them. The notes of the Uhl Pottery Company, amounting in the aggregate to \$7,200.00, were renewed by Weinheimer and Kreipke under their firm name of The Indiana Pottery Company as they respectively came due, and were renewed in the same name down to the time of the making of the plaintiffs' mortgage. At the time said notes were renewed, and at the time such new notes for new debts were made, said Old National Bank had no notice or knowledge that said Weinheimer and Kreipke, as a firm or as a corporation, had assumed the debts of said persons to their wives, and had no notice or knowledge that either Weinheimer or Kreipke owed such debts; but at said time, and at the time said new loans were made, it was done on the assurance of said Weinheimer and Kreipke to said Old National Bank that they, said Weinheimer and Kreipke, owed no other debts than the amount owing to said Old National Bank, and the fact of any other

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indebtedness was concealed from said Old National Bank by the said Weinheimer and Kreipke. On the 16th day of October, 1894, the defendant, the Indiana Pottery Company, assumed the indebtedness of the firm of Weinheimer and Kreipke and executed to the plaintiff, Elizabeth Weinheimer, a note for \$3,000.00, and to the plaintiff, Rose Kreipke, a note for \$3,000.00, and to the plaintiff, Rosine Heckman, a note for \$6,000.00. Said notes are the ones, copies of which are filed as exhibits with the complaint.

On February 9, 1895, said company executed and delivered to the plaintiff, Philip W. Frey, a note for \$500.00 for the indebtedness then due him from said defendant; that for the purpose of securing said notes, said Indiana Pottery Company, on February 9, 1895, executed and delivered to the plaintiffs the mortgage, a copy of which is filed with the complaint, thereby mortgaging to the plaintiffs all its property; that the plaintiffs caused said mortgage to be recorded in the mortgage records of the recorder's office of Vanderburgh county, of which said Indiana Pottery Company is and was at said time a resident, on February 11, 1895; that plaintiffs, upon securing said mortgage, immediately took possession under the same of all the property described therein, and retained possession thereof until the court, upon application of the defendant, the Old National Bank, appointed James W. Lauer receiver thereof, since which time said property has remained in the possession of said receiver; that on February 14, 1895, the defendant, The Indiana Pottery Company, for the purpose of securing said debt due from it to the defendant, the Old National Bank, executed and delivered to the bank a mortgage upon the same property theretofore mortgaged by it to the plaintiffs herein, and said mortgage contained the

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following language, namely: "Subject to the mortgage heretofore given to Rosine Heckman and others, which is duly recorded. It being the intention of this instrument to convey to the said mortgagee by way of mortgage all of the property of said Indiana Pottery Company, real and personal, of whatsoever kind of which they may be possessed, subject to the mortgage above described;" that the defendant, the Old National Bank, accepted said mortgage, and caused same to be recorded in the record of mortgages in the recorder's office of Vanderburgh county, Indiana, on the 18th day of April, 1895; that at the time the defendant, said bank, accepted said mortgage it had notice of the existence of plaintiff's mortgage; that the complaint in this action was filed, summons issued and served on the defendant, the Old National Bank, on April 9, 1895; that on April 20, 1895, the defendant, the Old National Bank, in another action in this court against the said Indiana Pottery Company, for the same debt, and upon the same note secured by its said mortgage, obtained a judgment for the sum of \$10,302.03 against the said Indiana Pottery Company, and that said judgment remains unsatisfied; that the first paragraph of said defendant's answer and cross-complaint asking for the foreclosure of its said mortgage in this action remained on file as a part of its pleadings herein until the beginning of the trial, and part of the evidence had been heard, at which time, by leave of court, the said defendant was permitted, over the objection of the plaintiffs, to dismiss its said answer and cross-complaint theretofore filed herein; that at the time of the filing of its said first paragraph of cross-complaint said Old National Bank had knowledge of all the facts in these findings stated, and alleged therein that the said mortgage to plaintiffs was fraudulent as against it, and prayed that the lien of its

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mortgage be declared superior to the lien of the plaintiffs' mortgage. Said mortgage to said National bank included both real estate and personal property, and was upon the same property as that included in the plaintiffs' mortgage. Said mortgage was executed on the 14th day of February, 1895, and was delivered to and accepted by the defendant, the Old National Bank, but was not put on record until April 18, 1895. Said defendant upon the trial of this action dismissed its first paragraph of cross-complaint, and before the answer of the plaintiffs to the second paragraph of the cross-complaint of the defendant, the Old National Bank, which sets up that the Old National Bank is estopped from asserting that the mortgage to the plaintiffs, or any of them, is fraudulent was filed, abandoned in open court all claim to said mortgage to the Old National Bank, and offered to satisfy and cancel said mortgage by its judgment, and consent to distribute the proceeds of the Indiana Pottery Company, which now or hereafter may be realized from the mortgaged property of said company, among the *bona fide* creditors of said Indiana Pottery Company without reference to said mortgage to said Old National Bank, and the said Old National Bank then stated by its counsel that it neither asks nor seeks, in this action or otherwise, any advantage or benefit from such mortgage; that on January 5, 1895, the defendant, the Indiana Pottery Company, paid to the plaintiff, Rosine Heckman, the sum of \$120.00, to the plaintiff, Elizabeth Weinheimer, the sum of \$60.00 and to the plaintiff, Rose Kreipke, the sum of \$60.00; that on January 12, 1895, said defendant paid to the plaintiff, Elizabeth Weinheimer, \$425.00, and to the plaintiff, Rose Kreipke, \$425.00; that on January 28, 1895, the said defendant paid to the plaintiff, Rose Heckman, the sum of \$365.00; that on and before the 24th day

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of December, 1894, the defendant pottery company paid to the plaintiff, Rosine Heckman, the sum of \$2,000.00; that on the 9th day of February, 1895, the defendant pottery company paid to the plaintiff, Philip W. Frey, the sum of \$250.00; that said amounts were paid by the said defendant upon the notes hereinbefore mentioned; that upon the issue between the defendant, David Ingle, and the defendant, The Indiana Pottery Company, and the plaintiff, Rosine Heckman the court finds that the note given by the said defendant pottery company to the plaintiff, Rosine Heckman, on the 16th day of October, 1890, as hereinbefore set out was made with the fraudulent intent and purpose to cheat, hinder and delay the said defendant, David Ingle, in the collection of the indebtedness of the said Indiana Pottery Company to him; and as between said parties, the court finds that the mortgage to said plaintiff was given with the same intent, all with the knowledge and consent of the said plaintiff, Rosine Heckman. And the court further finds that, as between said parties, the payment of the sum of \$120.00 by the Indiana Pottery Company to the said Rosine Heckman was paid to her without any consideration and with the intention to cheat, hinder and delay the creditors of the said Indiana Pottery Company in the collection of their claims; that there is now due the plaintiff, Philip W. Frey, upon his note and mortgage, described in the complaint herein, principal and interest, the sum of \$276.86, and \$27.68 attorney's fees, making the total amount due him, \$304.54; and that the same, by virtue of said mortgage, is a lien upon the property described in said mortgage, superior to the liens of his co-plaintiffs, and the judgment and mortgage liens of the defendants herein; that as between the defendant, the Old National Bank, and the plaintiff, Rosine Heck-

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man, and the defendant, The Indiana Pottery Company, there is now due the plaintiff, Rosine Heckman, upon her note and mortgage described in the complaint herein, the sum of \$4,587.20, principal and interest, and \$228.35 attorney's fees, making a total amount due her, as between said parties, of \$4,815.55; and that the same, by virtue of said mortgage, as between said parties, is a lien upon the property described therein, subject to the liens of her co-plaintiffs, Rose Kreipke and Elizabeth Weinheimer, and Philip W. Frey, and the defendant, David Ingle, and superior to the judgment and mortgage lien of the defendant, The Old National Bank; that there is now due the plaintiff, Rose Kreipke, upon her note and the mortgage described in the complaint herein, the sum of \$2,476.66, principal and interest, and \$152.80 attorney's fees, making the total sum due her \$2,629.46; and that the same, by virtue of said mortgage, is a lien upon the property described therein, equal to the lien of her co-plaintiff, Elizabeth Weinheimer, and superior to the judgment and mortgage liens of the defendants; that there is now due the plaintiff, Elizabeth Wenheimer, upon her note and the mortgage described in the complaint herein, the sum of \$2,476.66, principal and interest, and \$152.80 attorney's fees, making a total amount due her of \$2,629.46; and that the same, by virtue of said mortgage, is a lien upon the property described therein equal to the lien of her co-plaintiff, Rose Kreipke, and superior to the judgment and mortgage liens of the defendants.

And the court states the following conclusions of law:

"1st. That the plaintiff, Philip W. Frey, ought to recover from the defendant, The Indiana Pottery Company, upon the note, a copy of which is filed with the complaint, the sum of \$304.54, together with his costs,

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to be levied and collected without relief from valuation and appraisement laws; and that said sum is secured by the mortgage, a copy of which is filed with the complaint, and is a valid and subsisting lien upon the property therein described superior to all liens of all parties to this action.

"2d. That the plaintiffs, Elizabeth Weinheimer and Rose Kreipke, ought severally to recover of and from the defendant, The Indiana Pottery Company, upon the notes executed to them, copies of which are filed with the complaint, each, the sum of \$2,629.46, together with their costs, to be levied and collected without relief from valuation and appraisement laws; and that said sums are each severally secured by the mortgage filed with the complaint, and are each valid and subsisting liens equal in priority to each other, upon the property therein described, subject to the lien in favor of the plaintiff, Philip W. Frey, and superior to the liens of all other parties to the record herein.

"3d. That the defendant, Old National Bank, by the acceptance of the mortgage executed to said defendant, The Indiana Pottery Company, hereinbefore in the findings of fact described, and with knowledge of the facts in these findings hereinbefore set out, and proceeding in this court to foreclose the said mortgage and have it declared a lien superior to that of the mortgage executed to the plaintiffs herein by reason of and under a cross-complaint setting up the facts in these findings hereinbefore set out, is estopped from setting up the invalidity in whole or in part of the mortgage to the plaintiffs, and the rights of the said defendant, Old National Bank, must be held subject to the rights of the plaintiffs under the mortgage set out in their complaint.

"4th. That the mortgage filed with the complaint



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herein is fraudulent and void as between the plaintiff, Rosine Heckman, and the defendant, David Ingle; and the lien of the judgment defendant, David Ingle, is superior to any lien or claim of the plaintiff, Rosine Heckman.

"5th. That as between the plaintiff, Rosine Heckman, and the defendant, The Indiana Pottery Company, and the defendant, The Old National Bank, the plaintiff, Rosine Heckman, ought to recover of and from the defendant, The Indiana Pottery Company, the sum of \$4,815.55, together with her costs herein, to be levied and collected without relief from valuation and appraisement laws; and that the same is, by virtue of said mortgage, as between the said parties, a valid and subsisting lien upon the property described therein, subject to the liens of her co-plaintiffs, Philip W. Frey, Rose Kreipke and Elizabeth Weinheimer, and the defendant, David Ingle, and superior to the judgment and mortgage lien of the defendant, The Old National Bank.

"6th. That by virtue of his judgment and execution aforesaid, the defendant, David Ingle, has a lien upon the property described in the mortgage filed with the plaintiffs' complaint in the sum of \$380.20; that by virtue of its judgment and execution aforesaid the defendant, The Old National Bank, has a lien upon the property described in the mortgage filed with the plaintiffs' complaint in the sum of \$11,062.40.

"7th. That the mortgage set forth in the plaintiffs' complaint ought to be foreclosed, and that the equity of redemption of each and all of the defendants in and to the mortgaged property, and all persons claiming under and through them, ought to be forever barred and foreclosed; and that the real estate and personal property in said mortgage described ought to be sold as other lands and personal property are sold upon

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execution; and that the proceeds of said sale ought to be applied, *first*, to the payment of the costs of such sale, and the costs of this action; *second*, to the payment of the amount due the plaintiff, Philip W. Frey, as hereinbefore found; *third*, to the payment of the amount due the plaintiff, Rose Kreipke, and the plaintiff, Elizabeth Weinheimer, as heretofore found; and if there is not a sufficient sum realized from such sale to pay said amounts in full, then, and in that event, to apply the same *pro rata* on the respective amounts due them; *fourth*, to the payment of the judgment in favor of David Ingle, as hereinbefore set out, with interest thereon from the date thereof; *fifth*, to the payment of the amount due plaintiff, Rosine Heckman, as hereinbefore found; *sixth*, to the payment of the judgment in favor of the Old National Bank, as hereinbefore set out, together with interest thereon from the date thereof."

The principal question arises over the correctness of the third conclusion of law, and so much of other conclusions as involve the same question, namely: that the appellant, the Old National Bank, by the acceptance of the mortgage to it, by The Indiana Pottery Company, with the recital therein that such mortgage was subject to the provisions of the mortgage to appellee, Rosine Heckman, and others on the same property, securing to said Rosine \$6,000.00, estopped the bank from setting up the invalidity of said mortgage, making the rights of the bank subject to the rights of the plaintiffs under the mortgage set out in the complaint, including the \$6,000.00 secured thereby to Rosine Heckman.

In support of this conclusion of law we are referred to *Muncie National Bank v. Brown*, 112 Ind. 474, and *Anderson v. Oskamp*, 10 Ind. App. 166.

The case above cited from this court in 112 Ind., as

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to the mortgages involved, was very much like the present. While this court there held that the bank, the second mortgagee, could not assail the first mortgage for fraud, yet it did not hold that there was any estoppel in the case. All that was there said as to this point was as follows: "The trial court sustained the motion of the appellee to strike out all evidence tending to prove that the mortgage executed to the appellee was fraudulent. The Muncie National Bank is not in a situation to complain of this ruling, for in the mortgage which it accepted, that executed to the appellee, is recognized as valid. It is recited in the former mortgage that 'It is expressly stipulated herein that this mortgage is made second and subsequent to that of one executed to Cornelia A. Brown and John C. Jenners to secure the payment of certain of the indebtedness of the said Francis M. Brown to them and each of them, as described in said mortgage.' Having treated the mortgage as a valid one, the bank cannot be allowed to assail it on the ground that it was made with the intent to defraud creditors."

Cornelia A. Brown brought suit to foreclose her mortgage and the Muncie National Bank filed a cross-complaint and sought to foreclose its mortgage against Mrs. Brown and to secure priority over Mrs. Brown's prior mortgage, and introduced evidence tending to prove that her mortgage was void because it was given to defraud the creditors of her husband, the mortgagor.

It was held that her mortgage could not be thus assailed by the bank in an effort to foreclose its own mortgage, so as to give it priority over the first mortgage, even though such first mortgage was fraudulent and void as against creditors. To the same effect is the case of *Anderson v. Oskamp*, *supra*.

These decisions, at first blush, seem to be wrong,

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but neither of them rest upon the ground of estoppel. They rest strictly on the contractual relation created by the second mortgage. It must be observed that neither of them rest the ruling upon the rights which spring out of the relation of creditor and debtor; indeed, no such relation is disclosed outside of the contract expressed in the mortgage involved in each case. In each of these cases it was sought to secure a right to the second mortgagee which he did not possess as a creditor of the maker of the alleged fraudulent mortgage, but which he acquired wholly and solely by virtue of the terms of his contract as expressed in his second mortgage, and that was a specific lien upon certain property.

It is no injustice and no hardship to limit such a person to the express terms of the contract upon which he sues. It is no answer to this position for him to say as the appellant bank did in the case now before us, that had he known that the first mortgage was fraudulent and void as against creditors, he would not have accepted the second mortgage with the stipulation that it was to be subject to such first mortgage. The refusal to so accept would not have bettered the condition of the person so refusing. The mortgagor was not bound to execute any mortgage whatever. It takes two contracting parties to make that contract, the same as any other. If the mortgagor could not obtain the terms to be inserted in the contract of mortgage which he demanded, he had a right to decline to enter into it, the same as the mortgagee had a right to decline to receive it if its terms did not suit him.

But it may be said that as appellant bank was ignorant of the fraud in the first mortgage when it accepted the second with the stipulation mentioned therein, it ought to be allowed in foreclosing its own

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mortgage to show such fraud to the overthrow of the first mortgage, because it is axiomatic that fraud vitiates and paralyzes everything it permeates. That would be true in any proper proceeding to avoid or set aside any contract or mortgage for fraud. But the appellant bank was not seeking to set aside its own mortgage for fraud or anything else. It was seeking, so long as the first paragraph of its cross-complaint remained undismissed, to enforce its mortgage by foreclosing it. But that is not all it was seeking to do; it was seeking to enlarge the terms and conditions of its own mortgage contract by proving fraud against the first mortgage. Fraud may furnish means to avoid one contract, but not to enlarge the terms of another, which would amount to the court making a new contract for the parties which they never made for themselves. In *Anderson v. Oskamp, supra*, Gavin, J., speaking for our Appellate Court, very aptly and forcibly observes: "We are unable to see any great inequity in the enforcement of the rule which holds the appellees bound by the provisions of the instrument under which they assert their rights. They are not claiming here their right as creditors merely to subject the property fraudulently conveyed to the payment of their debt by the ordinary process of law, but they assert a contract right, claiming under the mortgagor, and superior to the position of creditors standing on their rights as creditors. By this contract right they sought and obtained a preference over all the other unsecured creditors. If they are not permitted to dispute the validity of the first mortgage, they are deprived of nothing which they expected to obtain. Their mortgage only purports to give them a lien second to appellant's mortgage. They received exactly what they contracted for. Their debtor offered them certain security. They accepted it, thus obtain-

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ing a preference over the other creditors. Their position is clearly distinguishable from that of the grantee, who obtains relief from his assumption of a mortgage upon the ground of fraud in the transaction with himself affecting the consideration moving to him.

"The distinction between appellees' rights as creditors to set aside the fraudulent mortgage by proper procedure, and their right to maintain their lien as mortgagees, is clearly made in the case of *Tolbert v. Horton*, 31 Minn. 518, 18 N. W. 647, wherein a junior mortgagee sought to avoid as fraudulent a prior mortgage to which his was, by its terms, made subject." That court held that it could not be done. To the same effect are 2 Cobbey, Mortgages, section 1039, and authorities there cited, and *Stevens v. McMillin*, 37 Minn. 509, 35 N. W. 372.

In 2 Cobbey on Mort., *supra*, it is said: "Priority of the second mortgage, as between the two, can never be obtained except upon an agreement of the parties. Such stipulation runs with the mortgage, and, whether it is on file or off, it always tells the same story to all persons whose interests require its perusal. It is a stipulation binding upon the parties, showing how the mortgaged property is to be regarded, and continues so long as the mortgage continues."

Thus it will be seen that the cases involving the question now under consideration do not rest upon the doctrine of estoppel in a strict legal or technical sense, though some of the authorities referred to say that the second mortgagee is estopped to deny the validity of the first mortgage. But it is apparent that they all rest upon the principle that a party seeking to enforce a contract in his favor must be bound and limited in his relief thereunder to the terms and stipulations of the contract.

But this principle has no application whatever

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where a party to such a contract is seeking relief upon his rights as a common creditor independent of the contract of mortgage.

When a person takes a mortgage to secure the payment of a debt due him, in contemplation of law such mortgage is for the sole benefit of the mortgagee. His failure to enforce it cannot injure or deprive the mortgagor of any of his rights; hence, the mortgagee may abandon his mortgage and all rights therein secured to him, and the mortgagor has no right to complain of such abandonment.

Therefore, when the appellant bank dismissed the first paragraph of its cross-complaint setting up its second mortgage for foreclosure, seeking priority over the first mortgage, and in open court abandoned all rights secured to it by said mortgage, and offered to cancel the same, and relied wholly upon its judgment for the amount of the notes embraced in said mortgage, and relied wholly upon its second paragraph of cross-complaint setting up said judgment and seeking to avoid the first mortgage for fraud, it relieved itself entirely from the effect of the recital contained in its said abandoned mortgage. Therefore, the superior court erred in its conclusions of law holding that such recital in said mortgage estopped the bank in any form of action from attacking the first mortgage.

In its second paragraph of its cross-complaint the bank relied solely upon its rights as a common unsecured creditor, as evidenced by its judgment. And the findings of fact and other conclusions of law correctly show that the first mortgage, in so far as it secured \$6,000.00 to appellee, Rosine Heckman, was fraudulent and void as against creditors generally, and that appellant was one of such creditors.

We therefore conclude that the superior court erred

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in its conclusions of law that Rosine Heckman should recover anything as against the appellant, the Old National Bank, and that, on the contrary, it ought to have concluded as a matter of law, that said Rosine ought not to recover anything as against said bank, for the reason that all of the mortgage as to her, except the amount of \$2,000.00, was fraudulent and void as to said bank, and that said \$2,000.00 had been paid.

It is also contended by the appellant bank that the conclusions of law are wrong because they do not hold the first mortgage void as to Elizabeth Weinheimer and Rose Kreipke. This result is sought on the ground that there was no consideration for the mortgage as to them.

The theory of the second paragraph of cross-complaint is that the conveyance of all of the property of the old corporation, The Uhl Pottery Company, to Lewis Weinheimer and William H. Kreipke, the owners of all its capital stock except a nominal amount, was made in fraud of the rights of creditors of the old corporation. But the allegations of the cross-complaint are not sufficient, even if the special findings were, to make a fraudulent conveyance, the only allegation being, "conveyed to said Weinheimer and Kreipke \* \* \* all the property of said Uhl Pottery Company \* \* \* for the purpose of defrauding the creditors of said Uhl Pottery Company." But even if the allegations of the cross-complaint and the facts found were sufficient to make that conveyance fraudulent and void as against the creditors of the Uhl Pottery Company, it is difficult, if not impossible, to see how that could harm the appellant bank. The same property was afterwards conveyed to the new corporation, and it assumed the payment of so much of the bank's present claim as had been created by the old corporation, and for it and the balance of said



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claim created by the new corporation, the said new corporation gave its notes to the bank, which it reduced to judgment, and which judgement forms the basis of its present claim. Thus, it is seen that the bank is in just as good a condition as if the supposed fraudulent conveyance had never been made. Such a conveyance furnishes no cause of action.

The only allegation made in the second paragraph of the cross-complaint against the validity of the mortgage as to Rose Kreipke and Elizabeth Weinheimer is that the same was wholly without consideration, and was made solely for the purpose of defrauding the creditors of the Indiana Pottery Company.

The facts found show that the consideration for the notes of said Elizabeth and Rose was money to the full amount loaned by each of them to their husbands respectively. That when the old corporation was dissolved or abandoned, and all its property being vested in Weinheimer and Kreipke, they formed a partnership under the firm name of The Indiana Pottery Company, and that while such partnership was in existence, by agreement of both partners, they being all of the firm, such firm, in consideration of the surrender of the individual note of each partner, held by each of the wives of the partners, namely: said Rose and Elizabeth, said firm executed its notes to each of said wives for the same amount of the note surrendered by each of them. When the new corporation of the same name as the said partnership was organized, said partnership conveyed all its property to said new corporation, in consideration of which said new corporation executed its note to said Rose Kreipke and Elizabeth Weinheimer, each, for the same amount of the note which each of them held on the partnership, which partnership notes were then surrendered and canceled. The notes thus executed by said new cor-

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poration, The Indiana Pottery Company, are the notes secured in their behalf in the mortgage sued on. The facts found show that the Uhl Pottery Company had property enough to pay its debts at the time it conveyed it all to Weinheimer and Kreipke, but the assumption of the debts due to the wives of the partners made the firm of Weinheimer and Kreipke insolvent. That, however, did not destroy the consideration for the notes. Partners may waive the right to compel partnership assets to be first applied to the payment of partnership debts, and they may transfer or incumber the firm property to pay or secure *bona fide* debts of the individual members of the firm, and the transaction cannot be successfully attacked, either by a creditor or a receiver appointed by reason of the insolvency of the firm. *Johnson v. McClary*, 131 Ind. 105, and authorities cited; *Simmons Hardware Co. v. Thomas*, 147 Ind. 313. The court did not err in concluding that the notes to Rose Kreipke and Elizabeth Weinheimer were supported by a sufficient consideration. The conclusions of law stated among the facts found are void and amount to nothing. *Stalcup v. Dixon*, 136 Ind. 9.

The other conclusions of law, not already mentioned, we do not disturb any further than they may be qualified or affected by the conclusion we reach.

For errors pointed out by us in the conclusions of law, the judgment is reversed, with instructions to the superior court to restate its conclusions of law so as to conform to this opinion, and render judgment accordingly.

## Asbury v. Frisz.

## ASBURY v. FRISZ.

[No. 18,195. Filed May 25, 1897. Rehearing denied October 12, 1897.]

**JUDGMENTS.**—*Declaring a Person of Unsound Mind.—Setting Aside for Fraud.*—A judgment that a person is of unsound mind and incapable of managing his estate will be set aside as fraudulent where it is shown that the same was procured by falsely representing that the person alleged to be insane was confined in a hospital, and could not be produced in court without injury to his health. *pp. 517, 518.*  
**SAME.**—*May be Attacked for Fraud by a Direct Proceeding.*—A judgment procured by fraud may be attacked directly, and set aside in a proceeding instituted for that purpose. *p. 518.*

From the Vigo Circuit Court. *Reversed.*

*Josiah T. Walker*, for appellant.

*S. C. Stimson, R. B. Stimson and H. A. Condit*, for appellee.

**HOWARD, J.**—This was an action to annul a judgment. The court sustained a demurrer to the complaint, and this is the only ruling assigned as error.

It is alleged in the complaint that, on April 17, 1895, the appellee filed his verified petition in the court below, stating therein that this appellant, "Jerome Asbury, is a resident of Vigo county, State of Indiana, and that he is of unsound mind and incapable of managing his own estate, and is now temporarily in the insane hospital at Indianapolis, Indiana, and that said Jerome Asbury draws a pension from the United States government; that it is necessary to have letters of guardianship and a copy thereof enclosed to and filed in the pension office in order to properly make out his pension voucher and draw said

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pension." The complaint asked that appellant be declared of unsound mind and incapable of managing his own estate, and that the appellee be appointed his guardian. May 6, 1895, was fixed as the date when the appellant should appear and answer to the complaint. On May 9, being the 4th day of the May term, both parties were defaulted, and the cause was dismissed at the costs of appellee, judgment being rendered against him. Said May term ended July 13, 1895; and it is alleged in the complaint to annul, that "The records of said court do not show that any steps were taken, or any proceedings had in said cause in said court after said cause was dismissed and judgment rendered against the petitioner therein, on the 9th day of May, 1895, until the 28th day of September, 1895, the same being the twenty-fourth judicial day of the September term of said court, at which time said cause was, without notice of any kind or character to this plaintiff, again placed upon the probate docket of said court. There was no written motion or complaint filed in said court on the 28th day of September, 1895, nor at any other time, asking that the default and judgment taken against the plaintiff therein on May 9, 1895, be set aside, or asking that said cause be reinstated for trial upon the docket of said court, and the records of said court do not show the filing of any such motion or complaint; that said court, on said 28th day of September, 1895, assumed jurisdiction of and in said cause, and, on its own motion without notice to this plaintiff, reinstated it on the docket of said court; that after said cause of action was dismissed, this plaintiff gave it no further attention, and at no time thereafter was this plaintiff, by summons or any other means, notified that there would be any further proceedings of any kind or character had in said cause. The records of said court do

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not show that plaintiff had any notice of the pendency of said action at any time after said dismissal thereof, May 9, 1895, neither were there any official returns made in or to said court showing that this plaintiff had in any way been served with such process or notice, and this plaintiff never had any such notice."

The proceedings had on September 28, 1895, being the only record made in the case after that of May 9, 1895, are as follows: "No. 2740. [being the same number used in the case filed April 17, 1895]. *In re Alleged Insanity of Jerome Asbury*. Pet. for App. of Guardian.

"Comes now in open court \_\_\_\_\_, and files verified petition herein, showing to the court that Jerome Asbury is a resident of Vigo county, State of Indiana, and is a person of unsound mind and incapable of managing his own estate, and prays that a guardian be appointed for the said Jerome Asbury. And the cause being now at issue is submitted to the court for trial, and it appearing to the court that the said Jerome Asbury has been duly served with process ten days before the day set for trial, and comes now the prosecuting attorney and files answer herein, and it being further shown to the court that the defendant is an inmate of the Central Hospital for the Insane at Indianapolis, Indiana, and cannot be produced in court without injury to his health. And the court, after having heard the evidence and being fully advised, finds that said Jerome Asbury is a resident of Vigo county and State of Indiana, and is a person of unsound mind and incapable of managing his own estate. And the court now appoints Joseph W. Frisz guardian of said Jerome Asbury, with a bond fixed at \$500.00." Judgment was thereupon entered, in accordance with the finding.

The only complaint ever filed in the case was that

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filed April 17, 1895; and it is alleged that the said complaint was never refiled in the court. The docket for the September term shows that the proceedings had on September 28, 1895, when the alleged judgment was entered, were had upon the complaint filed April 17, 1895, the return day of which is shown to have been May 6, 1895.

It is further alleged that on September 28, 1895, the appellee, for the purpose of inducing the court to proceed with the trial of the cause in the absence of this appellant, falsely and fraudulently made the following representations to the court: (1) That the appellant was then of unsound mind and incapable of managing his own estate; (2) that the appellant was then an inmate of the Central Hospital for the Insane at Indianapolis; and (3) that the appellant could not then be produced in court without injury to his health; and that it was by these false and fraudulent representations that the court was induced to proceed with the trial and render judgment against appellant; that, as shown by the records of the Vigo Circuit Court, the appellant had been duly discharged from said hospital as cured, on May 22, 1895, and was never again admitted to said hospital, as an inmate or otherwise; that on September 28, 1895, and for four weeks prior thereto, appellant was engaged in manual labor at Brazil, and was able to attend the trial of said cause without injury to his health; that while so engaged at work he returned home every Saturday evening, and was always seen by appellee before going back to work on the succeeding Monday morning; that the finding of the court in the proceedings of September 28, 1895, "that the said Jerome Asbury has been duly served with process ten days before the day set for trial," had reference to and was based upon the process which was issued April 17, 1895, and

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the officer's return thereto showing service of said process for the return day thereof, May 6, 1895.

There can be no question, as we think, that the facts alleged in this complaint show fraud upon the court and upon the appellant, and that the court had no jurisdiction to enter the judgment of September 28, 1895, or to appoint a guardian for appellant. It is clear that the court assumed the right, on its own motion and without notice to appellant to reinstate, at the September term, 1895, the cause which had been set for the May term, 1895, and which had been dismissed and final judgment rendered therein at said May term. It is alleged that no steps were taken, and no proceedings of any kind were had in the cause after the final judgment rendered May 9, 1895, until the proceedings of September 28, 1895. It is apparent, therefore, that the notice issued April 17, 1895, returnable May 6, 1895, could give the court no jurisdiction over appellant at the September term.

But the statute providing what proceedings shall be had before a person may be declared of unsound mind, requires even something more than mere notice to the one who is thus to be deprived, not only of his personal liberty and the control of his property, but also of his place in the community as a rational being. It is declared in section 2715, Burns' R. S. 1894 (2545, R. S. 1881), as amended by the act of March 9, 1895 (Acts 1895, p. 205), that before the trial of such issue shall proceed, "such court shall cause such person to be produced in court." No case could better show the wisdom of such a provision for the protection of the rights of a citizen than does the case at bar, where a citizen, while engaged at his daily toil, was deprived of liberty, property, and even of his legal *status* as a man.

It is true that a subsequent section of the same stat-

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utes, section 2717, Burns' R. S. 1894 (2547, R. S. 1881), provides, that "If the court shall be satisfied that such person, alleged to be of unsound mind, cannot, without injury to his health, be produced in court, such personal appearance may be dispensed with." This, however, so far from permitting the trial to take place in the absence of the person whose insanity is to be inquired into, makes it but the more imperative upon the court that he should be present; save only that it cannot be done "without injury to his health;" and of this "the court shall be satisfied." It was particularly in relation to this matter that fraud was practiced upon the court, in the case at bar. It was represented that the appellant was confined in the Insane Hospital at Indianapolis, and could not be produced in court without injury to his health, whereas, at the very time, he was at work every day in Brazil, and, of course, fully able to attend court. Moreover, this fact was well known to appellee, who saw him every week between his return home on Saturday evening and going to work on Monday morning. Had the appellant been produced in court it is scarcely conceivable that he should have been deprived of his liberty and his property, and placed in custody of the appellee.

Even then, without considering the question of notice, but solely on the ground of fraud in the misrepresentation respecting the ability of the appellant to be present at the trial, the judgment must be reversed.

That a judgment procured by fraud may be attacked directly and set aside in a proceeding instituted for that purpose, has often been decided. *Nealis v. Dicks*, 72 Ind. 374; *Earle v. Earle*, 91 Ind. 27; *Brown v. Grove*, 116 Ind. 84, 9 Am. St. 823; *Brake v. Payne*, 137 Ind. 479; *Kirby v. Kirby*, 142 Ind. 419, and numerous authorities there cited.



## Martin v. The State.

The judgment is reversed, with instructions to overrule the demurrer to the complaint, and for further proceedings not inconsistent with this opinion.

## MARTIN v. THE STATE.

[No. 18,188. Filed October 18, 1897.]

**APPEAL AND ERROR.**—*Bill of Exceptions.*—When the transcript shows the filing of a completed bill, within the time required, it will be inferred, that the bill was properly signed by the judge prior to the filing thereof. *pp. 519, 520.*

**CRIMINAL LAW.**—*Evidence Must Support the Conclusion of Guilt.*—It is the duty of the court, before sustaining a conviction for a crime, to find evidence supporting the conclusion of guilt. It is not enough that evidence merely tends to support such conclusions. *p. 521.*

**LARCENY.**—*Evidence.*—A conviction for larceny is not sustained by evidence that a person with whom defendant had been tramping, and with whom he entered a store, stole a suit of clothes, while defendant was looking at clothing in another part of the store, defendant manifesting no surprise upon the arrest of both, immediately upon leaving the store. *pp. 520, 521.*

From the Perry Circuit Court. *Reversed.*

*C. H. DeWeese* and *W. A. Land*, for appellant.

*W. A. Ketcham*, Attorney-General, *Merrill Moores*, *S. M. Hilligoss* and *T. W. Lindsay*, for State.

**HACKNEY, J.**—The appellant seeks a reversal of the judgment of the lower court wherein he was found and adjudged guilty of the crime of larceny. The question urged arises upon the evidence, and the appellee objects to any consideration of the evidence upon the ground that the record does not affirmatively disclose that the bill of exceptions was signed by the trial judge before the same was filed by the clerk. It affirmatively appears from the entries of the court

148	519
162	78
148	519
163	503

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that on the 9th day of February, 1897, the appellant filed, during the term, and within the time allowed, the bill of exceptions copied into the transcript. The bill so copied discloses that it was tendered to and signed by the judge on said 9th day of February, 1897.

From the record entries and the copy of the bill, including the signature of the judge, but one inference is possible, and that it is that the signing preceded the filing.

It has not been held, as in the required preliminary filing of the longhand manuscript of the evidence, to become a part of the record, that the filing of a complete bill, under sections 641, 1916, Burns' R. S. 1894, is not sufficient. While signing is a prerequisite to the filing of a bill, because the instrument does not become a bill until it is signed, when the transcript shows the filing of a completed bill, within the time required, the single inference must be that it was signed and in the condition in which it is shown to have been filed. Otherwise it must be presumed that the clerk has certified that which is untrue.

Upon a careful study of the evidence, we are satisfied that it was not sufficient to support the finding of the court.

Two men, Martin and Thayer, tramping from Cincinnati to Evansville, arrived at Tell City in the evening and visited two clothing stores, in each of which Martin sought a pair of jean trousers, of a kind usually kept in such stores, and in neither of which could they be found at that time. During their visit to the second of said stores, and While Martin was looking at trousers in the back part of the store with his back to Thayer, the latter stole a suit of clothes; which he secreted under his coat, and when, in leaving the store, they stepped from the outer door, they were both arrested for stealing said clothes.

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Martin v. The State.

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There was no evidence of a previous understanding that Martin would occupy the attention of the clerk of the store while Thayer would steal the clothes, nor that Martin knew Thayer intended to steal or had stolen the clothes, nor was there evidence tending to show that Martin did not, in good faith, desire to purchase trousers.

It was shown that Martin made no complaint of his arrest, and manifested no surprise concerning it, and the State insists that this raises an inference of guilt. Conduct at the time of arrest is admissible as tending to show a consciousness of guilt. *State v. Phelps*, 5 S. D. 480, 59 N. W. 471; *Greenfield v. People*, 85 N. Y. 75, 39 Am. Rep. 636; Gillett's Indirect and Collateral Ev., section 13. But here it became the duty of the court, and it is our duty, before sustaining a conviction, to find evidence supporting the conclusion of guilt. It is not enough that evidence merely tends to support the conclusion of guilt, it must support it. When the officer approached the two men Thayer dropped the clothes upon the sidewalk and disclosed the larceny, and it became apparent to them both that their arrest was for the offense thus disclosed. Silence at the time was not an admission, for he was not required to speak. We do not feel safe in accepting the evidence, so slightly tending to establish guilt, as of the character required. If connected with other facts and circumstances strongly tending to show guilt, the circumstances referred to might be controlling, but, in the absence of any other fact or circumstance, they seem wholly inadequate.

The judgment is reversed, with instructions to grant the appellant's motion for a new trial.

Johnson v. The State.

## JOHNSON v. THE STATE.

[No. 18,857. Filed October 18, 1897.]

148 522  
157 530148 522  
171 52

**LARCENY.**—*Identification of Stolen Property.*—A watch and chain, the stealing of which is charged, are sufficiently identified, where the prosecuting witness testified that the watch found in defendant's possession was exactly like his watch, and positively identified the chain attached thereto as the chain attached to his watch at the time it was stolen. p. 523.

**CRIMINAL LAW.**—*Possession of Stolen Goods.*—*Evidence.*—When it is proven that property has been stolen, and the same property, recently after the larceny, is found in the exclusive possession of another, the law imposes upon such person the burden of accounting for his possession, and of showing that such possession was innocently acquired; and if he fails so to account satisfactorily for such possession, or gives a false account, the presumption arises that he is the thief. p. 524.

**SAME.**—*Possession of Stolen Property.*—*Evidence.*—Where the identity of property described in an indictment for larceny is in dispute, evidence is admissible to show that the defendant, at the time of his arrest, had in his possession other stolen property. pp. 524-526.

From the Marion Criminal Court. *Affirmed.*

*David Johnson* and *J. O. Spahr*, for appellant.

*W. A. Ketcham*, Attorney-General and *Merrill Moores*, for State.

**MCCABE, C. J.**—The appellant was convicted of petit larceny on an indictment charging both larceny and burglary, and sentenced to pay a fine of ten dollars and imprisonment in the State prison for three years, disfranchisement, and incapacity for holding any office of trust or profit for three years.

The action of the trial court in overruling appellant's motion for a new trial is assigned as the only error complained of. The points made under the motion for a new trial relate to the sufficiency of the evi-

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dence to support the verdict, alleged errors in the admission of evidence, and irregularity as to the jury.

The proof showed that several dwelling houses in the city of Indianapolis, during the Christmas week of 1896, had been entered by unknown persons, in the night time, and that various articles of personal property had been taken and carried away from such houses, among which was a watch and chain charged in the indictment to have been stolen.

The first point made is, that the evidence does not sufficiently identify the watch and chain as that belonging to Daniel C. Hitt, as alleged in the indictment; but we think that the evidence was amply sufficient to establish the identity of the stolen property. Mr. Hitt testified substantially that the watch found in the defendant's exclusive possession was exactly like his watch, and, as to the chain on it, he testified that "The chain I would identify positively as mine." This, we think, was sufficient, amid all the other surrounding circumstances in evidence, to warrant the jury in inferring that it was the watch which had been stolen a short time before, in the night time, from Mr. Hitt's dwelling house. An eminent author on evidence says: "It is an established rule of evidence, that, 'when, on a trial for larceny, identity is in question, testimony is admissible to show that other property, which had been stolen at the same time, was also in the possession of the defendant when he had in possession the property charged in the indictment.'" 3 Rice Ev., p. 732.

It is also contended that the evidence is insufficient to prove that appellant stole the watch. The uncontradicted evidence of Mr. Hitt is that on Christmas night his watch and chain were taken from his bedroom by some unknown person, and that he valued the chain at \$1.25 and the watch at \$13.75. Timothy

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Splann, the chief of detectives of the city, with two other officers, went a day or two afterwards to Johnson's room in the city, and found an overcoat. Johnson stated that he got the coat at a misfit store in Louisville, and claimed that the watch then on his person was his own property. They also found there some silverware and a crucible to be used in the melting of gold and silver. The overcoat was fully identified by George R. Root, as were the gloves and handkerchief in its pockets, as his property which had been stolen from his residence in Indianapolis about the same time. The silverware was identified by the witness Sophia Simon, the owner. It was stolen from her house about the same time that the watch in question was stolen.

When it is proved that property has been stolen, and the same property, recently after the larceny, is found in the exclusive possession of another, the law imposes upon such person the burden of accounting for his possession, and of showing that such possession was innocently acquired; and if he fails to so satisfactorily account for such possession, or gives a false account, the presumption arises that he is the thief. *Smathers v. State*, 46 Ind. 447; *Jones v. State*, 49 Ind. 549; *Bailey v. State*, 52 Ind. 462, 21 Am. Rep. 128; *Madden v. State*, *ante*, 183, and cases there cited; *Goodman v. State*, 141 Ind. 35.

The appellant gave a false account, both as to the watch described in the indictment, and the overcoat not therein described. He made no attempt to account for his possession of the silverware. All this authorized and justified the jury in presuming that appellant was the thief that stole the watch, at least.

In this connection it is earnestly contended that the trial court erred in admitting the evidence of Mr. Root and Sophia Simon as to the stealing of the overcoat

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and silverware found in appellant's possession. The authority already quoted and cited above, warrants and justifies the admission of the evidence, so long as the identity of the watch was in dispute, and it appears from the record and briefs that it was in dispute. One of the questions involved by the evidence was whether the possession of the stolen watch was a guilty or an innocent possession. There are many ways in which the possessor of recently stolen property may rebut the presumption arising from such possession, besides accounting therefor satisfactorily. Such presumption may be opposed by the attending circumstances, such as the open and notorious possession of the property, and unsuspicious conduct of the accused in reference to the possession, use, and claim of ownership of such property; also, by the good character and habits of life of the accused. If these circumstances should raise a reasonable doubt in the mind of the jury of the guilt of the defendant, he should be acquitted. *Jones v. State, supra.*

These considerations bring this case within the class of cases mentioned in *Shears v. State*, 147 Ind. 51, where it is said: "There is a class of offenses in which from the nature of the offense itself in which the necessity and propriety of this species of evidence is recognized by the courts; for instance, in cases of conspiracy, uttering forged instruments and counterfeit coin or money, and receiving stolen goods. In these cases, and others perhaps, the act itself which is the subject of inquiry is almost always of an equivocal kind and from which the animus cannot, as in other crimes, be presumed, and almost the only evidence which could be adduced to show the guilt of the prisoner would be his conduct on other occasions. Wherever the intent with which an alleged offense was committed is equivocal, and such intent becomes an issue at the

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trial, proof of other similar offenses within certain reasonable limits, is admissible as tending to throw light upon the intentions of the accused in doing the act complained of." *Crum v. State*, ante, 401. The act here under investigation was the possession of the stolen property, and the question was whether such possession was a guilty possession or an innocent possession. There was no error in the admission of the testimony of George R. Root or Sophia Simon as to the stealing of the overcoat or the silverware.

The sixth ground of the motion for a new trial is, "That the court erred in admitting the evidence of one Timothy Splann in regard to the imprisonment of the defendant in the southern prison for the commission of a former crime." We are relieved from deciding the very interesting question sought to be raised by this branch of the motion for a new trial on account of the fact that the record shows that no such evidence was either offered or admitted on the trial of the cause. In the testimony-in-chief of the witness, Splann, the following questions and answers are found in the record: "Q. Now look at this and state what it is. A. That is called a crucible to melt gold and silver in, so he told me himself. I asked him where he got it, and he said at Charley Mayer's. Q. Did he tell you when he bought it? A. No sir; he didn't say when he bought it, but he said he bought it since he came back from the southern prison."

There is not a word in the record about the defendant having been imprisoned in the southern prison for the commission of a former, or for any other crime, or about his imprisonment in the southern prison, either with or without the commission of a crime, either formerly or otherwise. Hence, no question is presented to us as to whether the evidence above recited was erroneously admitted over the appellant's objection,



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or as to whether the court erred in refusing to strike it out, because all such questions must be raised by making the ruling of the trial court thereon a ground for the motion for a new trial.

The last point made under the motion for a new trial is that the court erred in permitting the jury to separate after hearing the evidence and argument of counsel without instructing them in regard to their duties. If such action, or failure to act, on the part of the court were available error, such error is not made to appear in the record, because the record fails to show such separation and such failure to instruct them as to their duties.

We therefore conclude that the trial court did not err in overruling appellant's motion for a new trial.

The judgment is affirmed.

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CAMPBELL v. THE STATE.

[No. 18,189. Filed May 25, 1897. Rehearing denied Oct. 13, 1897.]

**APPEAL.—Errors Will Not be Reviewed on Appeal Unless Exposed by the Record.**—On appeal, the record furnishes the only evidence to sustain alleged errors of which a party complains. In the absence of such errors being properly exposed by the record they cannot be considered, and all reasonable presumptions will be indulged by the Supreme Court in favor of the rulings and judgment of the trial court. *p. 529.*

**SAME.—Bill of Exceptions.—Longhand Manuscript of Evidence.**—The record must affirmatively show that the longhand manuscript of the evidence was filed in the clerk's office before it was incorporated in the bill of exceptions. *p. 530.*

From the Marion Criminal Court. *Affirmed.*

*J. W. Noel, F. J. Lahr and F. L. Littleton, for appellant.*

*W. A. Ketcham, Attorney-General, Merrill Moores, C. S. Wiltsie and J. A. Pritchard, for State.*

148	527
148	529
149	50
149	633
149	709
150	48
150	50
150	184
151	329
148	527
154	48
148	527
157	96

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JORDAN, J.—Colin Campbell, the appellant, was indicted for the crime of embezzlement, the indictment charging that he as the agent and employe of the Metropolitan Life Insurance Company, did feloniously, etc., appropriate and convert to his own use money belonging to said company. Upon a trial before a jury he was convicted of the crime with which he was charged, and over his motion for a new trial was sentenced to suffer the punishment fixed by the jury, being a fine and imprisonment in the State's prison. The only error assigned in his appeal is the overruling of his motion for a new trial. Numerous errors are specified in the motion for a new trial, the principal one, however, as insisted by appellant's counsel, being that the lower court "erred in continuing the cause on August 17, 1896, in the absence of the defendant and without judicially determining that cause existed for continuance." This insistence, however, is not supported by any part of the record properly before us. The entry from the order book of the trial court shows that a jury to try the cause was impaneled, on July 29, 1896, with the appellant present in person and by counsel. By the consent of both the defendant and the State, the jury after being impaneled was permitted to separate until the following day at nine a. m. The record on this day, being July 30, 1896, discloses the presence of the appellant in court, and, that owing to the illness of one of its members, the jury, by consent, was permitted to separate until nine o'clock a. m. on August 3, 1896. On this latter date, it further appears from the entry in the order book, that appellant was present in court, but by reason of the continued sickness of the juror, the trial of the cause was continued with appellant's consent until August 17, 1896, at nine a. m. What proceeding, if any, was had on August 17 is not shown by

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the record. The next entry in the order book discloses that the trial was resumed on the 8th day of September, 1896. On the hearing of the motion for a new trial an issue was raised by the appellant upon the question of a continuance being ordered on August 17, in his absence, and evidence both oral and written was heard by the court upon this issue, and after the hearing thereof the court seems to have found that the appellant was present in court at the time in controversy. None of this evidence, however, has been brought into the record by a bill of exceptions, and for this reason we are precluded from reviewing the decision of the court upon the evidence introduced upon this issue. *Naanes v. State*, 143 Ind. 299; *Townsend v. State*, 132 Ind. 315; *Meredith v. State*, 122 Ind. 514; *Choen v. State*, 85 Ind. 209.

All appeals to this court are tried by the record. It furnishes the only evidence to sustain alleged errors of which a party complains. In the absence of such errors being properly exposed by the record they can not be considered, and all reasonable presumptions will be indulged by this court in favor of the rulings and judgment of the trial court. There being no record before us, in any manner tending to support the contention of the learned counsel for appellant upon the question which they seek to present, we are bound to presume, that if a continuance, as insisted, was ordered by the court on August 17, it was properly and rightly ordered with the accused present in court. *Welsh v. State*, 126 Ind. 71; *Burrell v. State*, 129 Ind. 290; *Rhodes v. State*, 23 Ind. 24.

It is next urged that the court erred in excluding certain evidence from the jury, and also in refusing to give to the jury certain instructions at the request of appellant, and that the judgment is not supported

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Campbell v. The State.

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by the evidence. The evidence, however, is not in the record, and as a proper review and determination of any and all of the above questions depend upon the evidence given upon the trial, in its absence from the record, we are, under a well settled rule, precluded from giving them any consideration. It appears from the certificate of the clerk that a longhand manuscript of the evidence was filed on December 10, 1896. The bill of exceptions purporting to embody this evidence was also filed on the same day. The record, however, does not affirmatively disclose that the longhand manuscript was filed prior to its being incorporated into the bill of exceptions. That this is essential upon appeals to this court is well settled by many decisions. *Dean v. State*, 147 Ind. 215; *Citizens' Street R. R. Co. v. Sutton*, ante, 169, and the authorities there cited.

In the appeal of *Citizens Street R. R. Co. v. Sutton*, supra, this court said: "The statute authorizing the longhand manuscript of the shorthand report of the evidence, given upon a trial of a cause, to be certified to this court upon appeal, requires the party desiring to avail himself of this statutory right to file the same with the clerk before it is incorporated into a bill of exceptions. This duty, under the statute, rests upon the party who seeks by this method to have the evidence certified to this court, hence no presumptions or inferences on this question can be indulged in his favor; but it must affirmatively appear that he has complied with the requirement of the statute by first filing the manuscript with the clerk of the lower court before it was incorporated into the bill of exceptions, otherwise it cannot be regarded as properly in the record. This interpretation of the statute has been settled by repeated decisions of this court."

In the case of *Manley v. Felty*, 146 Ind. 194, the certificate of the clerk was substantially the same as is

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Noftsgcr v. Barkdoll et al.

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the one now in question. In the former, it was stated that the bill of exceptions was filed at the same time that the longhand manuscript was filed, while in the case at bar the word "now" is employed instead of the phrase "at the same time," both expressing the same meaning. We said in the Manley case, that the most favorable construction that could be placed upon the record for the appellant was, that the longhand manuscript of the evidence and the bill of exceptions were filed at the same time, and that the former had not been filed before it had been incorporated in the bill. Under the recitals in the record, and the statements embraced in the clerk's certificate, in the present case, the same construction is applicable.

For the reason stated, we must adjudge that the evidence in the case at bar is not in the record, and no available error being presented, the judgment is affirmed.

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NOFTSGER v. BARKDOLL ET AL.

[No. 18,153. Filed October 14, 1897.]

**PRINCIPAL AND AGENT.**—*Sale of Real Estate.*—*When Principal Not Bound by Statement Made by Agent.*—Where an agent, in negotiating a sale of real estate, stated to the purchaser that certain lots belonging to his principal, adjoining such real estate, would not, in his opinion, be fenced while being used for present purposes, and that such purchaser and his customers could pass in and out across said lots, such purchaser is not, by reason of such statement, entitled to have and hold an easement, or perpetual right of way across such lots where such agent had no authority to make a contract of sale without the consent of the principal, and the principal had no knowledge of anything having been said between the purchaser and agent as to the passageway at the time the sale was completed and the deed therefor made. *pp. 532-534*

**LICENSES.**—*Parol License to Pass Over Land.*—In order that a parol license to pass over the land of another shall become irrevocable, it must be shown that money was expended, or expense incurred by the licensee upon the faith of such license. *pp. 534, 535.*

148	531
161	119

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Noftsgcr v. Barkdoll et al.

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**SAME.—Naked License.—Revocable at Pleasure.**—Where the owner of real estate permits, without objection, an adjoining owner to use his lands as a passageway, such permission amounts to no more than a naked license which is revocable at the pleasure of the licensor. p. 535.

From the Fulton Circuit Court. *Affirmed.*

*Conner & Rowley*, for appellant.

*Essick & Metzler* and *P. M. Buchanan*, for appellees.

**MONKS, J.**—Appellant brought this action to enjoin appellees from fencing in certain real estate over which appellant claimed a private way to and from his property. The cause was tried by the court, and at the request of appellant the court made a special finding of facts, and stated conclusions of law thereon, to which appellant excepted. Final judgment was rendered in favor of appellees.

The assignment of error calls in question the conclusions of law.

The special finding, so far as necessary to the determination of this case is substantially as follows: "On and prior to May 14, 1888, the appellee, Christian Hoover, was the owner in fee simple of lots 301, 302, 303, and 304, in Robbins and Harter's addition to the town of Rochester, except a strip off of the east side thereof owned by the railroad company; that there was a planing mill on lots 303 and 304, which was in the possession of appellee, Barkdoll, as the tenant of his co-appellee, Hoover. Hoover had been offering all of said lots for sale, and had authorized Barkdoll to receive proposals therefor, and to act as his agent in negotiations for sales of the property, but said Barkdoll did not have authority to make a contract of sale without the consent of Hoover. Shortly before May 14, 1888, appellant commenced negotiations with said

Barkdoll for the purchase of a part of lots 301 and 302, for the purpose of erecting an elevator thereon. During the negotiations, he informed Barkdoll that he would need convenient approaches to the elevator building he proposed to erect on said lots, and offered to buy a strip six feet wide off of the west ends of said lots 302, 303, and 304, adjoining the alley on the west of the lots, in order that he might widen such alley to the width of sixteen feet, from his proposed elevator site out to Center street; but Barkdoll refused to sell said strip, but informed appellant that the lots on which the planing mill stood would not, in his opinion, be fenced while used for such planing mill purposes, and that appellant and his customers could pass in and out across said lots, and appellant made no further efforts to purchase said strip, or procure other approaches to said proposed elevator site from Center street on the south, but did purchase a strip of ground for an additional approach and way from Washington street, north of said proposed elevator site. That there were convenient approaches to the parcel of land conveyed to appellant as follows: One from Washington street down the public alley, and one from the same street along an open way, one from Monroe street on the west, through the public alley, running east and west, and one from Center street on the south through a public alley; that at the time that the deed was executed, May 14, 1888, there were driveways, one on the west, and one on the west side of the planing mill, wide enough to haul loads in two-horse wagons, which extended around the mill, the south end of which opened out on Center street; the space north of the mill to Washington street was vacant ground over which teams occasionally passed, but there was no driveway across said lots north of said planing mill. Appellant finally agreed to purchase

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*Noftager v. Barkdoll et al.*

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said lot 301, and thirty-five feet off of the north side of lot 302, for \$275.00, when Barkdoll informed him that appellee, Hoover, owned said lots and would make him a deed therefor; which deed was duly executed by Hoover and wife to appellant on said May 14, 1888. That when said deed was executed appellee, Hoover, had no notice or knowledge that anything had been said about appellant and his customers having a passage way across said lots 302, 303, and 304, or that anything had been said about not fencing the same. When said deed was executed appellant erected on the real estate conveyed to him an elevator at the cost of five thousand dollars. When appellant completed the erection of his elevator, and began buying and storing, receiving and shipping grain, he commenced using the driveways on the east and west side of said planing mill as approaches and passageways to and from his property, and all persons who hauled grain or other products to and from said elevator, from Center street, used said driveways without hinderance or objection from said appellees until September 5, 1894, when they threatened to build a fence so as to prevent appellant passing over said lots owned by said Hoover; that appellees knew that appellant and his customers were driving across said lots from Center street to the elevator." The court stated as a conclusion of law that appellant was not entitled to have and hold an easement or perpetual right of way on and across the parts of said lots 302, 303, and 304, owned by appellee Hoover.

Appellant claims that under the facts found he has an irrevocable license for himself and his customers to pass and repass on and across said lots to and from his elevator to Center street by two distinct ways, one on each side of the planing mill.

It has been held by this court that when money has



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been expended or expense incurred upon the faith of a parol license the same may become irrevocable. *Joseph v. Wild*, 146 Ind. 249, and cases cited. No license, however, was given or promised by appellee, Hoover, to appellant to pass on and across said real estate before or after he received the deed for the real estate upon which he erected the elevator. What Barkdoll said was, in effect, that appellant and his customers could pass on and across said lots until the lots were fenced, and that in his opinion the lots would not be fenced while used for planing mill purposes. This statement was made without the knowledge or consent of Hoover, the owner of the lots, and was in no manner binding upon him. Besides, if Barkdoll had been the owner of the lots, and what he said was sufficient to amount to a license to appellant to pass over the lots, it was revocable at pleasure. It is not stated in the special finding that appellant expended any money or incurred any expense upon the faith that such a license was perpetual, or that he relied upon it in any way. Without these essential facts the finding would not support appellant's claim of an irrevocable license, even as against Barkdoll. *Parish v. Kaspere*, 109 Ind. 586, and cases cited.

The mere fact that appellee, Hoover, the owner of said lots, knew that appellant and his customers were using the driveways around each side of the planing mill in going to and returning from said elevator to Center street, and that he did not object thereto, and even if he by his silence consented thereto, would amount to no more than a naked license which is revocable at pleasure. *Parish v. Kaspere, supra*. The burden of proof was upon appellant to prove that he and his customers had an irrevocable license to cross over said lots in going to and returning from his elevator to Center street. The facts stated in the special

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finding do not show that he had any such right. It follows that the court did not err in its conclusions of law.

Judgment affirmed.

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SONNTAG ET AL. v. KLEE ET AL.

[No. 18,227. Filed October 14, 1897.]

148	536
152	530
148	536
161	498
148	536
168	498

**APPEAL AND ERROR.**—*Release of Errors by Accepting Benefit of Judgment.*—*Estoppel.*—*Statute Construed.*—Under the provisions of section 644, Burns' R. S. 1894 (632, R. S. 1881), a party cannot accept the benefit of an adjudication and yet allege it to be erroneous; the acceptance of such benefits will be treated by the Supreme Court as a release of the errors assigned. p. 538.

From the Vanderburgh Circuit Court. *Appeal dismissed.*

*Phillip W. Frey and Peter Maier, for appellants.*

*Charles L. Wedding, for appellees.*

HOWARD, J.—This was an action by appellees against appellants for possession of certain real estate and machinery thereon.

The allegation made in the complaint as to the machinery is, that the appellees are "also the owners and entitled to the immediate possession of all the machinery, boilers, belting, pulleys, appliances, office furniture, and iron safe on said premises, which have been used as a part of the machinery and appliances in connection with the manufacture of furniture by said defendants."

The appellants answered by general denial, and also by a paragraph setting out the litigation and other matters relating to the history and ownership of the

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factory. It was stated in this answer that when appellants came into possession of the property, they placed therein a large amount of improved machinery which they claimed to own as movable property. The court, however, in its special finding of facts, found that the machinery so claimed by appellants was a part of the real estate, and that in the sale of the property to appellees on foreclosure of mortgage, "the lots, buildings, all machinery, appliances, belts, pulleys, and office furniture were sold to plaintiffs as an entirety, and as real estate."

Notwithstanding the issues so made, and the finding that "all the machinery" was sold to appellee, the court made its first conclusion of law as follows:

"At the time of the bringing of this action, the plaintiffs were and now are the owners in fee of all the property mentioned in the complaint, except the machinery which had been removed to the second floor and for which other machinery had been substituted, which machines so removed belong to the defendant company."

The exception so made in appellants' favor is carried out in the decree, in which, after adjudging that the appellees are the owners in fee simple of the lots described, "together with the buildings and improvements thereon, with all the engines, machinery, pulleys, belts, appliances in use in and about said premises, and that they recover of the defendants the possession thereof," the court continues: "But this shall not include machines removed to the second floor which are the property of the defendant company."

But appellees raise no question as to the exception in favor of appellants so made by the court in its conclusions of law and in its final decree. They simply ask for the affirmance of the judgment.

Appellees do, however, by their verified special an-

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swer in bar to the errors assigned, ask that the appeal be dismissed. In this answer it is averred, that the machinery awarded to appellants by the decree is of the value of one-half the machinery substituted for it by appellants, or of greater value; that after the rendition of the decree appellants, who are wholly insolvent, took the part of the machinery given to them by the court and sold and disposed of the same and converted the proceeds to their own use and benefit; and that appellants having thus accepted the benefits of so much of the judgment as was in their favor cannot now be relieved of so much of the judgment as was against them, and consequently are estopped from prosecuting this appeal.

Appellants admit and seek to justify their acceptance and sale of the machinery awarded to them, but contend that they are not thereby debarred from prosecuting their appeal from that part of the judgment in favor of appellees.

We are of opinion that this question has been settled against the contention of appellants, both by the statute and by the rulings of this court. In section 644, Burns' R. S. 1894 (632, R. S. 1881), it is said: "The party obtaining judgment shall not take an appeal after receiving any money paid or collected thereon." And in *Sterne v. Vert*, 108 Ind. 232, it was accordingly held that "A party cannot accept the benefit of an adjudication and yet allege it to be erroneous."

Nor is it material that appellees interposed no objection to the awarding of a part of the machinery to appellants. Appellees were satisfied with the decree, and are still satisfied with it. But if the judgment should be reversed and the case sent back for a new trial appellees would have suffered a distinct loss and appellants secured a clear gain in the removal of a part of the machinery from the controversy.

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"It does not alter the case," said Judge Mitchell in *Sterne v. Vert*, *supra*, "that there was no controversy respecting the several tracts, upon which the decree was given in appellant's favor. The appeal was, and must of necessity have been, from the whole decree as given. Having availed herself of so much of the decree as was favorable to her, both the statute (section 632) and the common law affirm that an appeal is thereafter denied to the appellant. Any other rule might result in bringing about embarrassing complications, and manifest injustice to the appellees, in case a reversal of the decree should result."

A like conclusion was reached in the recent case of *McGrew v. Grayston*, 144 Ind. 165, where numerous authorities are cited, and it is held that an acceptance of the benefits of a judgment will be treated as a release of errors. See also *Glassburn v. Deer*, 113 Ind. 174; *Stauffer v. Salimonie, etc., Gas Co.*, 147 Ind. 71.

Appeal dismissed.

PFAU, TREASURER OF BOARD OF SCHOOL TRUSTEES, v.  
STATE, EX REL. KETCHAM, ATTORNEY-GENERAL.

[No. 18,051. Filed October 15, 1897.]

MANDAMUS.—*Alternative Writ.—Sufficiency.—Statute Construed.*—An alternative writ of mandate, under section 5968, Burns' R. S. 1894, requiring the return to the State of unexpended school tuition revenue, which sets out the unexpended balance in excess of \$100.00 apportioned by the State to such school corporation, and alleges that such balance remains in the hands of the treasurer thereof, and that such treasurer refuses to refund same to the county treasurer, although often requested to do so, is sufficient. p. 542.

APPEAL AND ERROR.—*Motion to Strike Out Part of Pleading.—Practice*—Error cannot be predicated upon the action of the court in overruling a motion to strike out a part of the pleading. pp. 542, 543.

SAME.—*Special Findings.—Judgment.—Assignment of Error.*—Where the judgment of the court conforms to its conclusions of law, and

148	539
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there is no assignment of error as to the conclusions of law, no question can arise in this court as to motions for judgment by either party thereto on the findings. *p.* 543.

**SAME.**—*Special Findings.*—*Assignment of Error.*—Assignments that certain findings are not supported by the evidence, to be available on appeal must be considered only as reasons for a new trial. *p.* 543.

**SCHOOLS.**—*Unexpended Balance of Tuition Fund.*—*Order of Payment.*—*Mandamus.*—*Statutes Construed.*—Under the provision of section 5750, Burns' R. S. 1894, all tuition funds in the hands of a township trustee or school treasurer are, in effect, but one fund, and by the provision of section 5956, Burns' R. S. 1894, are to be applied and expended in the same manner; and it cannot be held, in a mandamus proceeding, under section 5968, Burns' R. S. 1894, to compel the treasurer of a school corporation to pay over to the county treasurer an unexpended balance of school tuition revenue in excess of \$100.00, apportioned to such school corporation by the State, that the treasurer first paid out to his teachers the funds received from the State, and then those derived from local sources. *pp.* 543-546.

From the Clark Circuit Court. *Affirmed.*

*Jonas G. Howard and James K. Marsh, for appellant.*

*W. A. Ketcham, Attorney-General, M. Z. Stannard and Leon O. Bailey, for appellee.*

**HOWARD, J.**—By an act approved March 3, 1893 (Acts 1893, p. 195), section 5968, Burns' R. S. 1894, the legislature amended section 114 of the school law (section 4482, R. S. 1881), which section provides for the apportionment by the Superintendent of Public Instruction of the tuition revenue of the State. The proviso in the amended section reads as follows:

"That any school corporation not expending the sum total of the tuition revenue apportioned to it by the state, shall, on the first Monday in July annually, report to and return to the county treasurer of the county in which said school corporation is situated, the unexpended balance of tuition revenue from said source in excess of \$100.00, and the county auditor of said county shall include all such unexpended balances

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in his report to the State Superintendent of Public Instruction, as tuition revenue collected in his county and ready for distribution at the next apportionment. Any township school trustee or treasurer of the board of school trustees of incorporated towns and cities refusing or neglecting to refund the said unexpended balance of tuition revenue as herein provided, shall be deemed guilty of a misdemeanor, and upon conviction shall be fined not less than double the amount so withheld."

The proviso so enacted was fully considered by this court in *State v. McClelland*, 138 Ind. 395, and was there upheld in all respects as a valid act. That case was not essentially different from the one now before the court, and must, as we think, control our decision here.

From the alternative writ, and from the finding of facts by the court, it appears, that the whole amount of tuition revenue received by appellant as treasurer of the board of school trustees of the city of Jeffersonville, to be used for the payment of teachers' salaries for the year preceding the first Monday of July, 1893, was \$19,492.70, of which amount, \$14,344.30 was received from the State, and the remainder from local sources. The amount of tuition revenue left in appellant's hands on the first Monday of July, 1893, after payment of all teachers' salaries for the previous year, was \$15,633.76, or 80.20315 per cent. of the whole amount received. As the sum left in the hands of the treasurer was 80.20315 per cent. of the whole amount received by him, the appellee claimed that, under the statute, the same percentage of that part received from the State, making \$11,504.58, should, as "unexpended balance of tuition revenue from said source," be returned to the county treasurer for redistribution by the Superintendent of Public Instruction. This

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claim was allowed by the court, and judgment entered accordingly.

Numerous errors are assigned on the appeal, many of them, however, of a rather technical character.

By the assignments numbered 1, 2, 3, 4, 7, and 8 the sufficiency of the alternative writ of mandate is questioned. The writ sets out the unexpended balance of tuition revenue in excess of \$100.00, apportioned by the State to the school corporation of the city of Jeffersonville for the year preceding the first Monday of July, 1893, and alleges that said balance remained in the hands of appellant as treasurer of the board of school trustees of said city; that, though required by law to pay the same over to the treasurer of Clark county, and often requested to do so, he refused and neglected, and still refuses and neglects to refund to said county treasurer the said balance in his hands. The writ was sufficient, as we think. It is substantially the same as that approved in *State v. McClelland*, *supra*.

The fifth assignment of error is, that the court overruled the motion to make the alternative writ more specific. Counsel do not argue this question, except to say that the facts constituting the commingling by the treasurer of the tuition revenues in his hands should be stated. To commingle is to put together in one mass, and the brief remark of counsel does not inform us why the statement made in the writ is not sufficient to show that the tuition funds in the hands of the treasurer were so blended as to be indistinguishable, and to constitute, in fact, but one fund. The argument made is not sufficient to disclose any error in overruling the motion to make more specific. *Allen v. Northwestern Mutual Life Ins. Co.*, 136 Ind. 608.

By the sixth assignment of error, the correctness of the court's action in overruling the motion to strike



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out parts of the alternative writ is called in question. Without considering the merits of the question so raised, it is enough to say, that it does not appear that appellant was harmed by the ruling. In *City of Crawfordsville v. Brundage*, 57 Ind. 262, it was said: "This court has repeatedly held, that the overruling, by the court below, of a motion to strike out a part of a pleading, is not, on appeal, an available error here. The reason assigned for such decision is, that 'At most, it can but leave surplusage in the record, which does not vitiate that which is good.'"

Under assignments 10 and 11, complaint is made that the court erred in refusing to render judgment upon the findings in favor of appellant, and in rendering judgment thereon in favor of appellee. These assignments also are unavailing. The judgment of the court conforms to its conclusions of law; and as there is no assignment that the court erred in its conclusions of law, no question can arise as to rulings made on motions for judgment by either party. The conclusions of law upon the facts found being taken as correct, the judgment following in accordance with such conclusions must likewise be taken as correct. Section 560, Burns' R. S. 1894 (551, R. S. 1881); *Nading v. Elliott*, 137 Ind. 261.

Assignments 12, 13, 14, and 15, that certain findings are not supported by the evidence, to be available at all, must be considered only as reasons for a new trial. *Nading v. Elliott, supra*; *Lewis v. State*, 142 Ind. 30.

There remains only the assignment that the court erred in overruling the motion for a new trial. Under this head, counsel for appellant argue very earnestly that the evidence does not support the findings of the court. This contention is based upon the circumstance that the total tuition revenue received for use

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during the year in question was but little in excess of the amount expended for teachers' salaries in that year, and that it is shown that large balances from previous years were also in the hands of the treasurer during that year. Counsel say that those balances from previous years were from local sources, and should not, therefore, be turned over to the State; that the State fund should be considered as first used in payment of teachers' salaries, and all balances as left from local funds only; that the balances, therefore, accumulated in the hands of the treasurer from year to year, no matter how large, or whether at all needed, must be retained in the hands of the treasurer; for what purpose it is not stated.

To this it may be answered, that while no local levies should have been made that were not needed to supplement the State fund apportioned for the city schools, yet when the funds were actually raised, no matter from what sources, and whether from the State or from the school city itself, as soon as they were placed in the hands of the treasurer they became one fund, to be used only for the payment of teachers. All tuition funds, except only "local tax for tuition," are named in section 5750, Burns' R. S. 1894 (4325, R. S. 1881), as constituting one fund, there denominated "school revenue for tuition." And, by section 5956, Burns' R. S. 1894 (4470, R. S. 1881), the local tuition fund itself is declared to be "under the charge and control of the same officers, secured by the same guaranties, subject to the same rules and regulations and applied and expended in the same manner as funds arising from taxation for common school purposes by the laws of the state." The only limitation prescribed is, that the local tuition fund shall be applied and expended in the locality where it has been collected. All tuition funds are then, in effect, but

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one fund in the hands of the township trustee or school treasurer, to be used as such by him in paying the teachers of his locality. There is no priority of use of one part of the common fund, but all, in the words of the statute, are to be "applied and expended in the same manner." There is therefore no warrant for saying that the treasurer first paid out to his teachers the funds received from the State, and then those derived from local sources. The funds were mingled, and from each was paid out, in each instance, its proportional part. It follows, as said in *State v. McClelland, supra*, that the method pursued in determining the proportion of the unexpended State fund to be returned "is the only correct one which could be adopted." All the funds were used in common, and the part of each fund which remains unexpended must bear the same relation to the original amount of such fund as the whole sum unexpended bears to the whole sum first received. The heavy balances from previous years, of which counsel make so much in argument, were themselves made up, in like proportion, of the several funds which had come into the hands of the treasurer. By the rule of proportion adopted, the school city was allowed to retain the full amount of every fund which could in any sense be considered as local, whether derived from congressional, liquor license, or local tuition sources.

The statute under which this action was brought was intended to do away with evils that had grown up in the levy, apportionment and expenditure of the tuition revenue of the State. Counsel for appellant, perhaps unwittingly, allude to one of those evils, saying: "The State school tuition revenue is a permanent and primary fund created for the education of all the children of the State, while the local fund is supple-

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mental in its character, and is only authorized to be levied and collected by the officers of said school corporation when it shall appear that the State school revenue apportioned by the State to said school corporation for any certain year will be insufficient to continue said school during said year for the desired length of time." Yet it is a matter of general knowledge that school officers in many cases did make local levies even when it was apparent that such levies were not needed, and when the balance on hand together with the amount to be apportioned by the State would be more than sufficient to continue the schools for the desired length of time. Large balances were thus, from year to year, needlessly accumulated in the hands of school officials. The evil, besides, was an unmixed one. The money exacted from the people, while of no value to the children, because not needed for the support of the schools in the locality, was in addition a source of temptation in the hands of those holding it. Other abuses growing out of the old practices are referred to in *State v. McClelland, supra*. The statute is not only valid, as there held, but is one that tends, justly and fairly, to distribute idle school funds so that they may, in the largest degree possible, aid in bringing about that condition of our schools which was sought by the framers of the constitution, "Wherein tuition shall be without charge, and equally open to all."

Judgment affirmed.

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WORKING v. GARN ET AL.

[No. 18,088. Filed October 15, 1897.]

APPEAL AND ERROR.—*Record.—Affidavit Presumption.*—Where the record discloses that an affidavit was filed in response to a motion made by an adverse party to strike from the files an answer filed

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by such party, and such affidavit is not brought into the record, it will be presumed on appeal that the facts stated in such affidavit supported the ruling made by the court on such motion. *p. 548.*

**PARTIES.**—*Examination of Before Trial.*—*Notice.*—*Refusal.*—*Effect.*—*Practice.*—*Statute Construed.*—The right to examine a party to a suit prior to the trial, under section 517, *et seq.*, Burns' R. S. 1894, is given upon notice to "the party to be examined and any other adverse party," and an answer of a party should not be stricken from the files on account of refusal to appear and submit to such examination, where a party, adverse to the examining party, was not notified of such examination. *pp. 548, 549.*

**TRIAL.**—*Admission of Evidence After Submission of Cause.*—*Practice.*—The rule in applications for new trials on account of newly discovered evidence, that such application must overcome the presumption that a proper effort would have produced the evidence at the trial, is applicable to a motion to permit the introduction of additional evidence after the submission of the cause and before the finding. *p. 550.*

**NEW TRIAL.**—*Surprise.*—*Newly Discovered Evidence.*—*Statute Construed.*—The fact that an adversary party produces evidence not anticipated is not such surprise as is contemplated by section 568, Burns' R. S. 1894, providing that a new trial may be granted for "surprise which ordinary prudence could not have guarded against." *p. 551.*

**EVIDENCE.**—*Weight Of.*—This court will not weigh the evidence for the purpose of determining conflicts therein. *p. 552.*

**FRAUDULENT CONVEYANCES.**—*Husband of Grantor.*—*Good Faith Of.*—A deed cannot be set aside on the ground of lack of good faith on the part of grantor's husband. *p. 552.*

From the Marshall Circuit Court. *Affirmed.*

*J. D. McLaren, George W. Holman, E. C. Martindale and J. H. Bibler, for appellant.*

*Samuel Parker, M. L. Essick and Julius Rowley, for appellees.*

**HACKNEY, J.**—The appellant sued the appellees to set aside a conveyance of real estate as fraudulently made by Rebecca Garn, her husband joining. The trial resulted in a special finding, with conclusions of law and judgment against the appellant.

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The appellant, prior to the trial, sought an examination of the several appellees pursuant to section 517, *et seq.*, Burns' R. S. 1894. Rebecca Garn and Minnie Hawkins, wife of the grantee, did not appear for examination, and William H. Hawkins, the grantee, and John W. Garn appeared for examination, but, under the advice of counsel, declined to answer certain of the questions propounded to them by counsel for appellant. This failure to appear, and refusal to answer was made the basis of a motion by the appellant to strike from the files the answers of the several parties named, and that motion was overruled as to Mrs. Garn and William H. Hawkins, and was sustained as to John W. Garn and Mrs. Hawkins. Error is here alleged in the overruling of said motion as to Mrs. Garn and William H. Hawkins. The record discloses that in response to this motion, an affidavit of Mrs. Garn was filed and considered by the lower court, but that affidavit is not brought into the record, and we have no means of knowing the facts it contained and upon which the lower court acted. It is our duty to presume that the facts stated in the affidavit supported the ruling of the lower court, and that no error was committed. *Huffman v. Copeland*, 86 Ind. 224. One effect claimed for the affidavit was to disclose the want of notice to Mrs. Garn of the proposed examination. Presuming such to have been the effect of the showing, the right to take the examination of any defendant did not exist, and no error was committed in refusing to strike out the answers of either Mrs. Garn or Mr. Hawkins. *Smith, Admr., v. Smith*, 80 Ind. 267. The right to examine is given upon notice to "the party to be examined and any other adverse party," section 518, Burns' R. S. 1894, and the case cited holds that an answer by one should not be stricken from the files for a refusal to answer ques-

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tions submitted upon examination, if one of the parties adverse to the examining party has not been notified. The ruling of the court, therefore, must be upheld, both as to Mrs. Garn and Mr. Hawkins.

It is next claimed that the trial court, in overruling appellant's motion, made after the submission of the cause and before the finding was made, to permit the introduction of additional evidence, committed an error. The evidence said to exist was that of one Baker, an attorney for the grantor and grantee in the making of the deed in question, and was to the effect that it had been agreed between the grantor and grantee, at the time the deed was executed, that money claimed to represent the consideration for the conveyance, but in fact borrowed and used to simulate a *bona fide* transaction, should be paid at a public banking house and thereby make evidence to support the conveyance; that a bill of sale of personal property, made by Mrs. Garn to Hawkins and dated as of the date of the deed, had been written a considerable time after the deed was written, and had been dated back to correspond with the date of the deed. The latter proposition did not involve an issue in the case, but was offered as a contradiction of testimony given by a witness, who, at the dates of the transaction, was the law partner of said Baker, and whose testimony was to the effect that the bill of sale had been executed on the day of the execution of the deed.

Several objections to the admissibility of the offered evidence have been discussed, that the witness held the information in the capacity of an attorney, and that it was therefore privileged; that the portion relating to the bill of sale was collateral; that no diligence was shown to obtain the evidence at the trial, and other objections. If we should go so far as to hold the evidence not privileged, it would not be de-

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nied that diligence to procure it at the trial was indispensable to the appellant's motion. *Bowman v. Clemmer*, 50 Ind. 10; *Hamm v. Romine*, 98 Ind. 77; *Allen v. Bond*, 112 Ind. 523; *Pemberton v. Johnson*, 113 Ind. 538; *Morrison v. Carey*, 129 Ind. 277; *Pfaffenback v. Lake Shore, etc., R. W. Co.*, 142 Ind. 246.

In motions for new trials for newly discovered evidence the presumption is that a proper effort would have produced the evidence at the trial, and the motion must overcome this presumption by showing diligence free from any delinquency. It was known at the trial that Mr. Baker had participated in the transactions in question, and the motion does not attempt to give any effort to procure the desired information from him, nor to excuse the failure to make such effort. No reason exists for applying to this case a rule differing from that prevailing as to motions for a new trial as we have stated it, and, if the proposed evidence was competent, it should have suggested itself to the appellant at the trial. The presumption against diligence was not overcome, and the court did not err in denying the motion.

Counsel for appellant next criticise the statement of the trial court as a conclusion of law upon the special finding of facts. The criticism, for it is not an argument, is that the conclusion is not one of law, but is the mere statement of an ultimate fact. The statement is that, "Upon the foregoing facts the court concludes the law to be that the deed executed to the said William H. Hawkins by the said Rebecca Garn and John Garn, her husband, on November 14, 1889, for the land described in the complaint, is not fraudulent and void, but is *bona fide* and valid." While the existence of fraud is a question of fact and not one of law, the conclusion of law need not embody a proposition of law, but may be stated generally or specially as the



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conclusion which, under the facts found, is required by the law. A conclusion in this case that the law was with the defendants would have been sufficient. It not infrequently occurs that a statement of fact can not be made without including a conclusion, and as often a conclusion, though one of law, must be stated in the form in which a statement of fact is made. Omitting, even if necessary, the statements that the deed was not fraudulent, it was stated not to have been void, but to have been valid, a sufficient statement of the conclusion required by the law.

The finding is criticised also in its failure to state the ultimate fact, that the deed was not executed in fraud of creditors. This criticism is only to condemn the appellant's exceptions to the conclusions of law, since the burden rested upon her to show the fraud, and the failure of the court to find it would be regarded as appellant's failure to discharge that burden.

One ground of the motion for a new trial was that appellant was surprised at the evidence concerning said bill of sale, the character of which evidence we have already shown, and another ground was the alleged newly discovered evidence of Baker, already referred to. "Surprise, which ordinary prudence could not have guarded against," is a statutory ground for a new trial, section 568, Burns' R. S. 1894, but the fact that an adversary produces evidence not anticipated is no such surprise as is contemplated by the statute. A plaintiff, it has been held, cannot claim surprise at the defendant's evidence, since he may avoid an adverse finding by dismissing his action, which he may renew. *Cummins v. Walden*, 4 Blackf. 307; *Helm v. First National Bank*, 91 Ind. 44. And one who would secure a new trial for surprise and newly discovered evidence must use diligence to avoid surprise and to procure the evidence before the trial. *Lockwood v. Rose*, 125

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Ind. 588; *State v. Bottorff*, 82 Ind. 538; *Reno v. Robertson*, 48 Ind. 106. We have already shown that no proper diligence was used to procure the evidence alleged to have been newly discovered.

It is insisted further that the findings of the court are contrary to and not supported by the evidence. There was evidence fully supporting the findings, and we have no power to weigh the evidence merely to determine conflicts.

It is argued incidentally that the action of the court in striking out the answer of John Garn, for failure to give evidence upon his examination before the trial, and in adjudging the complaint confessed as to him, rendered the deed of Mrs. Garn void for the want of power to convey by deed in which her husband was not a valid grantor. The good faith of John Garn was not essential to the validity of the deed, and his having joined his wife in the deed answered the requirements of the statute. As to John Garn, the deed was, by his default, rendered invalid so far as the appellant was concerned. It was not invalid as between Mrs. Garn and Hawkins by reason of a failure of John Garn to join, nor by reason of the default of John Garn.

We find no error in the record, and the judgment is affirmed.

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BREYFOGLE ET AL. v. STOTSENBURG, TRUSTEE.

[No. 18,201. Filed October 26, 1897.]

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**APPEAL AND ERROR.**—*Assignment of Error.*—*Separate Assignments by Different Appellants Under One Title.*—Separate assignments of error may be made by each appellant to an appeal from a joint judgment under one title. *pp. 553, 554.*

**ASSIGNMENT FOR BENEFIT OF CREDITORS.**—*Sales.*—*Failure to Report to Court.*—A purchaser of property from an assignee for creditors

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cannot interpose as a defense to an action by such assignee for the collection of notes given in payment for such property the failure of the assignee to report the sale to the court, without alleging an offer to return the property. *pp.* 554, 555.

PLEADING.—*Answer.*—Where an answer purports to be a bar or defense to the entire cause of action stated in the complaint, and in fact answers only a part of it, such answer is bad on demurrer for want of sufficient facts to constitute a defense. *pp.* 556, 557.

From the Clark Circuit Court. *Affirmed.*

*Jewett & Jewett and Kelso & Kelso, for appellants.*

*A. Dowling, George H. Voigt and Evan B. Stotsenburg, for appellee.*

MCCABE, C. J.—The appellee, as the assignee for the benefit of creditors of the New Albany Banking Company, sued the appellants in the Floyd Circuit Court to collect an indebtedness of \$146,076.44, evidenced by six promissory notes executed by said defendants, and by them also as the firm of Winstandley & Co., and to obtain an order for the sale of 812 1-2 shares of the capital stock of the Peerless Manufacturing Company, of Louisville, Kentucky, and 490 shares of the capital stock of the Little Falls Water Power Company, of Little Falls, in the state of Minnesota, represented by variously numbered certificates of stock specified in the complaint.

The issues formed were tried by the Clark Circuit Court, to which court the cause went on change of venue, resulting in a general finding for the plaintiff, upon which the court rendered judgment. The assignment of errors not waived by failure to discuss the same, call in question the rulings of the trial court in sustaining certain demurrers to certain separate answers by certain of the defendants. The appellee objects to the sufficiency of the assignments of error, because each appellant has assigned error of which he

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complains and affecting him alone, under one and the same single title of the cause or appeal. It is contended that this objection can only be obviated by making as many titles to the appeal as there are separate assignments of error. In support of this proposition we are cited to rule six of this court and *Snyder v. State, ex rel.*, 124 Ind. 335. Neither the rule nor the case cited afford any support to the proposition urged. The proposition is illogical, under the settled rule that there can be but one appeal from a joint judgment, whether the parties thereto are many or few. One appeal ought not to have different titles as a cause in this court, nor need the same title be repeated every time one of the appellants assigns error separately on such appeal. See *Gregory v. Smith*, 139 Ind. 48.

The first alleged error complained of is the ruling sustaining the plaintiff's demurrer to the third paragraph of the separate answer of the defendant Breyfogle. It is very difficult to determine just what the paragraph means, on account of the confused and uncertain method of statement of the facts therein relied on as a defense. So far as we are able to decipher it, the substance thereof is, that the notes sued on were given in consideration of the sale and transfer to the said defendant of certain assets and choses in action, belonging to said bank, by order of the Floyd Circuit Court to the plaintiff, as the assignee, so to sell and transfer the same. That pursuant to said order said assets and choses in action had been sold and delivered to said defendant Breyfogle by said assignee; and that said order provided that said assignee should make a report to said court of such sale and transfer for approval at the succeeding term of the Floyd Circuit Court; that no such report has ever been made by said assignee. The theory of this plead-

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ing doubtless, as appears from its own statements, as well as from appellant's brief, is intended as a plea of failure of consideration for the notes in suit. It is contended by said appellant that the failure to report the sale, and the failure of the court to confirm it, operates to prevent the title to the property sold and delivered from passing to him. It may be conceded that the title is not perfect without a report of the sale is made, and the same confirmed by the court. But, still, that does not make the sale and delivery of the property absolutely void. Unless the sale and delivery are absolutely void for want of a report and confirmation thereof, there is not a failure of consideration of the notes in suit. The said appellant does not claim that the sale and delivery of the bank assets and choses in action to him was void by reason of the failure of the assignee to report the sale, as he manifestly could not reasonably so contend, because the report of such sale and delivery might thereafter be lawfully made, approved and confirmed by the Floyd Circuit Court. And it may yet be lawfully made, approved and confirmed by said court. At most, the failure to report the sale and delivery of the property could only render the same voidable, a proposition we need not and do not decide. Assuming, without deciding, that the failure to report the sale and delivery of the property mentioned had the effect to render the sale voidable at the election of the vendee, it is very clear, we think, that he could not invoke the power of a court of equity to avoid the sale without making some kind of an offer to return that which he admits he has received, and still retains under the contract of sale. The answer in question makes no allegation of any such offer. For that reason, if not for others, it did not state facts sufficient to constitute a defense to the complaint, and hence the circuit court did not err in sus-

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taining the demurrer thereto for want of sufficient facts.

Appellant's learned counsel say that, "There are but two other questions in this case, which we desire to present and press upon your consideration, and they arise from the fifth and sixth paragraphs of \* Breyfogle's answer." These paragraphs of Breyfogle's separate answer contain a statement of a great multiplicity of facts thrown together in a confused heap, as if the pleader was doing his level best to prevent the court from understanding the general purport of the same. But we are relieved from much labor in deciding many questions which might arise on some of the facts thus stated, by reason of said paragraphs purporting to answer the whole complaint, and at most, if all that is claimed for them by appellant were true, they would be insufficient. The full extent to which they respectively go is to state a great variety of facts, designed to show that the assignment and transfer of the stocks mentioned in the complaint to the New Albany Banking Company as collateral security, were without authority of law, and void. There is not a word said in either, why there should not be a recovery upon the notes mentioned in the complaint. The complaint, it will have been observed, sought to recover a judgment upon the notes therein mentioned, as well as to obtain an order for the sale of the stocks mentioned therein, held by the trustee as collateral security for the payment of said notes. The answers purport to be a full defense, and if all that is claimed for them is true in fact and in law, they would each only amount to a partial defense, namely, a defense against the demand in the complaint for an order to sell the stocks to pay the judgment recovered on the notes. When an answer purports to be a bar or defense to the entire cause of action stated in the complaint, and

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in fact only answers a part of it, such answer is bad on demurrer for want of sufficient facts to constitute a defense. *Orb v. Coapstick*, 136 Ind. 313; *Falmouth, etc., Turnpike Co. v. Shawhan*, 107 Ind. 47; *Farman v. Chamberlain*, 74 Ind. 82; *Johnson School Tp. v. Citizens Bank*, 81 Ind. 515; *Moffit v. Roche*, 76 Ind. 75.

It follows, that the circuit court did not err in sustaining the demurrer to each of said paragraphs. The judgment is affirmed.

## WAMPLER v. STATE, EX REL. ALEXANDER ET AL.

[No. 18,350. Filed October 26, 1897.]

**MANDAMUS.—Practice.—Demurrer.**—In a mandamus proceeding, if the facts in the alternative writ alone, or when supplemented by those in the application, are sufficient to entitle the applicant to the peremptory writ, a demurrer addressed to the alternative writ alone, or to both the writ and application, should be overruled. pp. 560–562.

**SAME.—Proper Remedy to Coerce a Public Officer to Discharge His Duty.**—Mandamus is the proper remedy to coerce an officer to discharge a public duty, and if it is a matter in which the people in general are interested it is not required that the applicant show any legal or special interest in the result sought to be obtained. It is only necessary that he be a citizen, interested in common with other citizens in the execution of the law. pp. 563, 571, 572.

**COUNTY SUPERINTENDENT.—Courts Judicially Know the Time for Electing.**—Courts judicially know the proper biennial year in which the township trustees of each county in the State are required to meet and elect successors to county superintendents then in office. p. 565.

**SAME.—Time for Election of by Township Trustee.—Statute Construed.**—The provision of section 5900, Burns' R. S. 1894 (4424, R. S. 1881), that township trustees shall meet biennially on the first Monday in June and appoint a county superintendent, is directory merely, and a failure to get a quorum on that day does not prevent a meeting for that purpose on a subsequent day. p. 569.

**SAME.—Mandamus May be Invoked to Compel Attendance of Absent Trustee at Meeting to Elect Superintendent.**—Where a township trustee fails to meet with the other trustees for the purpose of electing a county superintendent on the day provided by statute,

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and such other trustees for lack of a quorum have adjourned from day to day, mandamus may be invoked to compel such absent trustee to perform his official duty by attending the meeting. *State v. Harrison*, 67 Ind. 71, in so far as it conflicts with this opinion, is overruled. p. 571.

From the Blackford Circuit Court. *Affirmed.*

*Jay A. Hindman*, for appellant.

*John A. Bonham*, for appellee.

JORDAN, J.—This was a proceeding in the lower court on the part of the relators, Virgil H. Alexander and Alexander Gable, to obtain a writ of mandate against the appellant, a township trustee of Blackford county, Indiana, to compel him to meet with them (who are also township trustees), for the purpose of electing a county superintendent of schools. On the filing of the application the court awarded an alternative writ. After being served with this writ, the appellant appeared in court and demurred for insufficiency of facts. First, to the application; second, to the alternative writ; third, to the application and alternative writ taken as one pleading. Each of these demurrers was overruled, and the proper exceptions were reserved. Appellant refusing to plead further, the court granted a peremptory writ of mandate, as prayed for by the relators, commanding the appellant to meet at the auditor's office at 9 o'clock a. m. on June 23, 1897, for the purpose of appointing a county superintendent. The several rulings of the court upon the demurrers are assigned as errors.

The following facts, among others, are substantially alleged in the application, and, in part, recited in the alternative writ: At and for more than one year prior to the filing of the application, on June 8, 1897, the relators were resident citizens and taxpayers of Blackford county, Indiana, and were each township trustees of said county; that there are four townships in



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that county, and no more, and appellant, at the beginning of this action, and for more than one year prior to said time, was the duly elected, qualified, and acting trustee of Harrison township, of said county; that these relators and appellant, as such trustees, were, in pursuance of law, required to meet at the office of the county auditor on the first Monday of June, 1897, for the purpose of appointing a county superintendent; that in pursuance of the statute and a previous written notice given by the county auditor to each and all of said trustees to meet at the time and place aforesaid stated, the relators, as such trustees, did, on the first Monday in June, 1897, the same being June 7, 1897, at nine o'clock a. m., meet at the office of the said auditor for the purpose of appointing a superintendent, but appellant, as such trustee, failed and refused to meet at said hour on said day, or at any other time during said day; that by reason of the fact that there were four township trustees, it was necessary for three, at least, of that number to meet, in order to organize and proceed with the business of electing a superintendent. During all of said day none of the trustees, except these relators, met at said auditor's office, whereby they were prevented from perfecting an organization, and appointing a county superintendent; that relators, from the time they met, as aforesaid, with the auditor, at his office, remained there ready to organize and appoint a superintendent, until the hour of twelve o'clock, midnight, on said day, and no other trustees having appeared at said meeting, or being present thereat, and they being unable to transact any business by reason of the absence of the other two trustees, adjourned to meet at the same place on the day following, June 8, 1897, at nine o'clock a. m. The relators again met at the time and place in accordance with their adjournment, but that

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neither the appellant nor the other trustee appeared at said meeting on said following day. It is further shown that these relators continued their meeting at the auditor's office on the day last mentioned, up to the time of filing their application herein, and it is alleged that they intend to meet for the purpose of electing a county superintendent, and adjourn from day to day until a quorum is secured, etc. They aver that the business of appointing a superintendent cannot be effected without the appellant being present with them at said meeting, and that no other adequate remedy exists.

The first contention of counsel for appellant is, that the facts as alone recited in the alternative writ are not sufficient to withstand a demurrer. Prior to the decision of *Board, etc., v. State*, 61 Ind. 75, a practice of treating the application as the complaint, in actions for mandate, even where the alternative writ had been issued, seems to have been recognized by this court. In the case above cited, a departure was made from this practice, and it was there held, in view of the provisions of the code of 1852, relative to mandamus suits, and upon the authority of *Moses on Mandamus*, that the alternative writ must be taken as in the nature of a complaint in the cause, and the facts stated therein must be sufficient to entitle the party to the writ.

In *Gill v. State*, 72 Ind. 266, the former decisions of this court, including *Board, etc., v. State, supra*, upon this question, were reviewed, and the rule was there stated as follows: "The alternative writ, when issued, will be taken as in the nature of a complaint in the cause," and "must show what is claimed, and in itself, or in connection with the complaint, petition or affidavit on which it is issued, show the ground on which the claim is made; and the facts stated must be suf-

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ficient in law to entitle the party to the writ." The court further saying: "This we think is in harmony with the spirit of the code, and with the practice which has long obtained in this class of cases, and, while it does not overrule, will prevent any undue extension or misapplication of the rule enunciated in the later cases referred to." This holding was followed in *Potts v. State*, 75 Ind. 336.

Since the decision in *Gill v. State*, *supra*, it has been the practice, in at least some of the trial courts in this State, to call in question, by the same demurrer, the sufficiency of the facts stated in the writ and application, taken together, and this procedure seems to have been recognized by the appellant in the lower court by addressing, as it did, in one particular, a demurrer to both the writ and application.

In the case of *Board, etc., v. Cutler*, 7 Ind. 6, this court held that it had been the practice to look into the whole record and determine whether mandamus is the appropriate remedy, as well as the question whether the allegations are sufficient to authorize the writ. While it may be, and ought to be considered the proper practice, under the more recent decisions of this court, which assert a rule of practice consistent with that generally prescribed by authorities on mandamus proceedings, to treat the alternative writ, unless the issuing thereof has been waived by the defendant, as a complaint, upon which issues of law and fact may be joined, and, generally speaking, the facts therein recited ought to be sufficient to justify the court in awarding the peremptory writ; nevertheless, those alleged in the verified application, upon which the alternative writ rests, may be, when necessary, used, or looked to, in order to supplement those embraced in the writ, and the application may be con-

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sidered by the court in connection with the alternative writ to which the demurrer may have been addressed. Therefore, if the facts in the writ alone; or when supplemented by those in the application, are sufficient to entitle the applicant to the peremptory writ, a demurrer addressed to the alternative writ alone, or to both the writ and application, should be overruled. This rule is in harmony with the holding in the cases of *Board, etc., v. Cutler, supra*; *Gill v. State, supra*, and *Potts v. State, supra*, and does not militate against other decisions of this court, wherein, in effect, it is held that the writ, when considered alone, without reference to the application, must be sufficient. This point being settled, we are not, therefore, in this case, as insisted by appellant, compelled to confine our inquiry only to the facts in the writ, but may consider them together with those alleged in the application.

The principal question submitted for our decision is: Are the facts disclosed by the alternative writ and application, when considered together, sufficient to warrant the lower court in its action in overruling the demurrer to the writ, and ordering the peremptory writ of mandate to issue, requiring the appellant to meet with the relators at the auditor's office of Blackford county, on the day mentioned, for the purpose of appointing a county superintendent?

The theory of the insistence of appellant's counsel is: 1st. That relators herein are not shown to have the requisite interest to entitle them to prosecute this action. 2d. That, under the facts, mandamus will not lie to compel the appellant to meet for the purpose of electing a superintendent on a day subsequent to the first Monday in June. Or, in other words, that he did not have the power, under the statute in controversy, of meeting, after the time provided therein, for the reason, as contended, that the law is mandatory in

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this respect, and restrains him from doing so; hence, on this ground, the principal contention is, that he cannot be mandated by the court to exercise a power which he did not possess after the first Monday in June, 1897, and, consequently, there can be no meeting and election by the trustees until the next biennial year. It is also insisted that it does not appear from the facts that any vacancy had occurred in the office of superintendent in Blackford county which was required to be filled on the first Monday in June, 1897.

Section 5900, Burns' R. S. 1894 (4424, R. S. 1881), provides: "The township trustees of the several townships of each county shall meet at the office of the county auditor of such county, on the first Monday in June, 1873, and biennially thereafter, and appoint a county superintendent, \* \* \* whose official term shall expire as soon as his successor is appointed and qualified. \* \* \* Whenever a vacancy shall occur in the office of county superintendent, by death, resignation, or removal, the said trustees, on notice of the county auditor, shall assemble at the office of the county auditor, and fill such vacancy for the unexpired portion of the term, \* \* \* and the county auditor shall be clerk of such election, in all cases, and give the casting vote in case of a tie," etc.

Section 1182, Burns' R. S. 1894 (1168, R. S. 1881), being section 804 of the civil code, provides: "Writs of mandate may be issued to any inferior tribunal, corporation, board, or person, to compel the performance of an act which the law specially enjoins, or a duty resulting from an office, trust, or station." Under this provision of our code, the rule is well affirmed that mandamus is the proper remedy to coerce an officer to discharge a public duty, and any person having an interest in the matter involved may apply for the

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writ. *Hamilton v. State*, 3 Ind. 452; *Henderson v. State*, 53 Ind. 60; *Holliday v. Henderson*, 67 Ind. 103.

Mandamus is regarded as an extraordinary remedy of an equitable nature, which will lie only where the law affords no other adequate remedy, and hence, without the aid of the writ, there would be a failure of justice.

The statute in express terms lodges the election of a county superintendent in the township trustees of each county, and imposes upon each of them the duty of meeting on the first Monday in June, beginning in 1873, and on the same day biennially thereafter, at the place designated, and of appointing a county superintendent. This being a duty enjoined upon these officials by law, therefore, in the event they refuse or neglect to discharge it, it then becomes one of the peculiar functions of a mandate to compel them to obey the law by discharging this duty, as there are no other adequate means to meet and remedy the evils and injustice which would result by reason of the failure or refusal of these public servants to respect and obey the law. Certainly, it cannot be successfully controverted but what mandamus may be invoked to enforce township trustees, or any one thereof to meet with each other at the time and place prescribed by law and proceed with the business of appointing a county superintendent. This being true, then if it can be said that they are not restrained or prohibited by the statute in question from meeting and performing this duty after the day prescribed, but still have the power to subsequently do so, there is no question but what, in the event of their failure or refusal to meet for the purpose mentioned, after the lapse of the time fixed by law, they may also be compelled to do so by a writ of mandate, on the application of any person shown to be invested with the right in the particular instance to demand it. *People v. Schiellein*, 95 N. Y. 124.

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Having reached this conclusion, we may proceed to determine whether, in view of the facts in this cause, and the law applicable thereto, the appellant still had the legal power to meet for the purpose provided by the statute, after the expiration of the time therein fixed, and was it his duty to exercise this power? We may, however, first say, in answer to appellant's insistence, namely: That there are no facts alleged showing that any vacancy had occurred in the office of superintendent of Blackford county which required a meeting of the trustees on the first Monday in June, 1897, in order to fill the same, that we recognize no merit in this contention. Under the provisions of the statute the official term of a county superintendent extends from one biennial election to the next, and terminates as soon as his successor is elected and qualified; and any one appointed to fill a vacancy holds only for the unexpired part of the term, and until his successor is elected and qualified at the next ensuing biennial election. We accordingly, judicially know, that 1897 is the proper biennial year in which the trustees of each county in the State were required to meet on the first Monday in June and elect successors to the superintendents then in office.

In arriving at a correct interpretation of the only point now involved, we may consider it, first, in the light of our own decisions which have a bearing thereon, and next, in that of other authorities.

In the case of *State v. Harrison*, 67 Ind. 71, it appeared that the trustees, being twelve in number, met on the first Monday in June, 1879, but were unable to choose a superintendent. On the morning of the next day they adjourned *sine die*. In pursuance of a notice from the auditor, eleven of them convened again in his office on June 16, 1879, and organized, and were proceeding to appoint a superintendent, when three of

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the number withdrew from the meeting, and the remaining eight selected a superintendent. The election was held invalid. The question as there involved, seems to have received but a cursory consideration, and the only reason given to support the decision is the bare mention of the fact that the appointment not having been made on the first Monday in June, and no vacancy existing by reason of removal, resignation or death, the appointment of the appellant therein was not authorized.

In *Sackett v. State*, 74 Ind. 486, the statute there involved required the common council of each city to annually elect at its first regular meeting in June one school trustee. The common council of the city of New Albany having failed to elect such trustee at its first regular meeting in June, in 1880, performed this duty at a regular session held on July 19 of the year, this action of the council was sustained. This court held, in that case, that while the election should have occurred at the first regular meeting in June, still the statute could not be construed as limiting the power of the council to the time prescribed, but that it could be legally exercised by electing a trustee on a subsequent day. In the course of the opinion, on page 489, it was said by the court, per Woods, J.: "The counsel for the appellee on the contrary insist that, under the law, the duty to elect is imperative, and that, in so far as it prescribes the time when the election shall be had, the statute is directory only.

"We concur in this position. The opposite view leads directly and necessarily to results which it is impossible to believe could have been intended by the legislature, and which an examination of the provisions of the law will plainly show were not intended. A failure to elect at the appointed time, as may well have been conceived, is liable to happen from many



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causes. A quorum of the common council may be wanting on account of accident, or of sickness, or of absence of its members; and, when a quorum is not wanting, a tie vote may defeat a choice. But if it be held that a failure to elect suspends the power to elect until the recurrence of the prescribed day, it is easy to see that corrupt motives and influences may intervene for the purpose of preventing an election at the appointed time. If reasonably possible to be escaped, an interpretation of the law which promotes or tends to such results should not be adopted."

The case of *State v. Harrison, supra*, was distinguished in this last appeal, and, in referring to it, Judge Woods said: "It may well be doubted, however, whether, if an election had been accomplished upon the second day, or upon the day of an adjourned meeting, held within a reasonable time, it would have been declared invalid; and possibly, after the adjournment without day, a mandamus might lawfully have issued to compel a reassemblage, in order to perform the work which they ought to have done before adjourning."

In *State v. Vanosdal*, 131 Ind. 388, 15 L. R. A. 832, the trustees met on the first Monday in June of the required year, and remained in continuous session until after midnight on that day, after which hour they elected a superintendent. This election was held valid.

In *People v. Allen*, 6 Wend. 486, the militia law of the state of New York made it the duty of certain commanding officers to appoint brigade court martials on or before the first day of June in each year. The commanding officer omitted to appoint the court martial in that case until July next following the time fixed by the law. The appointment was held valid. In reviewing the question of the power of the officer to ap-

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point the court martial, the court said: "Where a statute specifies the time within which a public officer is to perform an official act regarding the rights and duties of others, it will be considered *directory* merely, unless the nature of the act to be performed, or the language used by the legislature, show that the designation of the time was intended as a limitation of the power of the officer."

This statement of the law, at least, in five appeals, has been expressly approved by this court. See *Nave v. King*, 27 Ind. 356; *Day v. Herod*, 33 Ind. 197; *Jones v. Carnahan*, 63 Ind. 229; *Sackett v. State*, *supra*; *Jones v. Swift*, 94 Ind. 516.

In *Dillon on Munic. Corp.*, section 839 (3d ed.), the author says: "In this country it has been decided that an election for municipal officers may be held after the charter day, and that mandamus may be granted to compel the proper officers to give notice thereof."

In *State v. Smith*, 22 Minn. 218, the common council of the city of Duluth was invested by law with the appointment of a city assessor. The time fixed for his election by the city charter was at the first meeting of the council after the annual city election, or at an adjournment thereof. In 1874 the annual election was held on the first Tuesday in April. After this election the common council met on the 14th of that month, and adjourned *sine die* without having elected an assessor. On the 29th of April, in the same year, the council convened pursuant to an irregular adjournment, by a less number than a quorum, from a previous regular meeting, and elected an assessor. It was held that the latter was legally elected and entitled to the office. The court, in considering the point raised in the case, said: "In our judgment, the meeting held on April 14, 1874, with the presumed assent and participation of all of its members, was a valid meeting.

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Assuming that this was the proper time for the election of an assessor, the failure of the council then to act upon the matter, and its adjournment *sine die*, did not relieve it from the duty, which the law imposed upon it, of making an election. So far as relates to the time when such election should be made, the statute is simply directory. Having neglected its duty at the proper time, from whatever cause, the obligation still rested upon it to elect at the earliest opportunity."

While it is true that the statute in controversy does not in express terms provide for a meeting of the trustees on a day subsequent to the one named, neither does it expressly limit the power or right to meet on the day prescribed, and not thereafter. The duty of the trustees, under the statute, to elect a superintendent biennially, is imperative, and each of them is obligated to convene with the others on the first Monday in June of the proper year for that purpose. But there are no negative words in the statute, nor any feature or provisions therein to indicate that the legislature, under all circumstances, intended to limit their power to meet for the discharge of the duty assigned, to the day appointed, and thereby restrain or prohibit them from effectually executing it after the expiration of the time named. Upon this view of the case, under the rule so firmly settled by the authorities heretofore referred to, and others hereafter cited, the provisions of this statute, naming or fixing the time for the trustees to convene, must be considered as directory only, and not as prohibiting the exercise of the power or discharge of the duty imposed after the termination of the time named or appointed therein. Guided by this principle, and it is manifest, we think, that the legislature in naming the first Monday in June intended it as a direction to the township trus-

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tees to meet on that day and proceed to transact the required business of appointing a county superintendent. There is nothing in the character of the particular power with which the trustees are invested to warrant the inference or belief, on their failure to meet at the time mentioned, that they could not lawfully and effectually execute it on some subsequent day, as reasonably near as possible to that fixed by the statute. The following additional authorities support this construction of the statute in controversy. *Smith*, Const. Constr., sections 670 and 674; *Sedgwick*, St. Const. Law, p. 316; *Potter*, Dwarris Statutes, pp. 221 and 228; *People v. Trustees of Town of Fairbury*, 51 Ill. 149; *State v. Harris*, 17 Ohio St. 608; *Webster v. French*, 12 Ill. 302; *Pond v. Negus*, 3 Mass. 230, 3 Am. Dec. 131; *Williams v. School District*, 21 Pick. 75, 32 Am. Dec. 243; *Savage v. Walshe*, 26 Ala. 619; *City of Lowell v. Hadley*, 8 Metc. (Mass.) 180; *Ex parte Heath*, 3 Hill 42; *Gale v. Mead*, 2 Denio 160; *People v. Holley*, 12 Wend. 481; *Jackson v. Young*, 5 Cow. 269, 15 Am. Dec. 473; *Colt v. Eves*, 12 Conn. 242.

To place the interpretation upon the statute urged by the appellant would enable designing trustees to defeat its very object. By the failure or refusal of a sufficient number to meet on the day named, they might prevent a quorum from being obtained, and, consequently, no legal election could be effected on that day. If, then, as contended by appellant, there can be no valid meeting had or appointment made, by either compulsory proceedings or otherwise, until the same day at the next biennial period, the people would be at the mercy of such unfaithful officials, and the possible result might be to keep an incumbent in office perpetually. Under such an interpretation of this statute, a like result might follow, if a sufficient number of trustees should be pre-

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vented from assembling on the prescribed day, so as to defeat a quorum, by reason of sickness, or any other legitimate cause. Such results were not intended by the legislature in the passage of the law in question. There were four trustees in Blackford county, any three of whom, had they been present, would have secured a quorum for the lawful transaction of the business before them. *State v. Vanosdal*, *supra*, and the cases there cited. Relators being less than a quorum, could do nothing more than adjourn, as they did. Roberts' Rules of Order, section 43; Cushing's Manual, section 19; 1 Beach on Private Corporations, Section 276; 1 Thompson on Corporations, section 721.

Appellant's presence, under the circumstances, was essentially necessary, and, having the legal ability to be present, he refused to yield his obedience to the law and meet with relators, and thereby assist to carry out its object and purpose; and now, when confronted with the strong arm of the court compelling the performance of a willfully omitted duty, he seeks to shield himself from its performance under the claim, and upon the ground asserted that he no longer possesses the power to do so. This claim, as we have seen, the law does not support. The authorities constrain us to hold that, under the facts, the obligation to perform this important public duty continued to rest on appellant after the expiration of the legally appointed day, and the law did not deprive him of the power to perform it thereafter, and mandamus is the proper action to remedy the wrong perpetrated by him. In addition to other authorities on this point, see Smith's Addison on Torts, p. 648.

Where the question involved in a mandamus proceeding is of a public concern, as is the one herein, and the object of the action is to enforce the performance

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of a public duty or right in which the people in general are interested, the applicant for the writ is not required to show any legal or special interest in the result sought to be obtained. It is only necessary that he be a citizen, and, as such, interested in common with other citizens in the execution of the law. High on Extraordinary Remedies, section 431; *Board, etc., v. State*, 86 Ind. 8, and cases there cited. It follows, therefore, that the relators are shown to have the requisite degree of interest to enable them to maintain this action. It is to be regretted that appellant, as a public official, intrusted, under the law, with a public duty, should disregard its plain provisions and commands. Such neglect or refusal to perform a duty which he had sworn to discharge, merits severe condemnation. When public officers, charged with the execution of the law, refuse to obey its mandates, or willfully ignore them, the evil results which must necessarily follow from such acts, tend to undermine the very foundation of civil government. When such officers fail or refuse to discharge their plain duties under the law, not only do they violate their official oaths, but also subject themselves to the penalty imposed by section 2105, Burns' R. S. 1894 (2018, R. S. 1881).

It follows, from the conclusions reached, that the lower court was fully justified in overruling the demurrers, and in awarding the peremptory writ of mandate as it did. So far as the holding in *State v. Harrison, supra*, may be in conflict with this opinion, it must be deemed and held to be overruled.

Judgment affirmed.

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Thompson v. Kreisher.

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## THOMPSON v. KREISHER.

[No. 18,007. Filed October 27, 1897.]

**QUIETING TITLE.—Disclaimer of Title.—New Trial as of Right.—Statute Construed.**—Where, in an action for possession, and to quiet title to real estate and for damages for the wrongful detention thereof, under section 1062 *et seq.*, Burns' R. S. 1894, the defendant files a disclaimer of any estate or interest in the land, it was error to grant to plaintiff a new trial as of right under section 1076, Burns' R. S. 1894, as it was not the intention of said section to extend such right where the issue and judgment involved but the naked question of possession, with or without damages, and where title was not in question.

From the Clinton Circuit Court. *Reversed.**Martin A. Morrison*, for appellant.*R. W. Irwin*, for appellee.

**HACKNEY, J.**—This was an action by the appellant against the appellee in two paragraphs of complaint. The first, in the usual form, to quiet the title to real estate, and the second, in the usual form, for possession, and damages for the wrongful detention of said real estate. The appellee answered the first paragraph of complaint by disclaiming any interest or estate in said property; and he answered the second paragraph by disclaiming "any estate or interest in the real estate," and by denying that he then, or within six years thertofore, held possession of said real estate or any part thereof.

A trial resulted in a finding and judgment that the appellant was the owner of the lands; that his title thereto should be quieted; that he was entitled to the possession thereof and should recover one dollar as damages for the detention by the appellee from him.

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The court thereupon granted the appellee a new trial as of right, and the second trial of the cause resulted in a judgment, that the appellant should recover upon his first paragraph of complaint quieting his title, and that he should take nothing upon his second paragraph of complaint.

The action of the court in granting said new trial as of right to the appellee, and in overruling the appellant's motion for a new trial, for cause, following the second trial, presents the questions for consideration by this court.

Counsel for the appellant insists that, under the issues, the question of title was confessed, and that a new trial as of right was not allowable under the statute, section 1076, Burns' R. S. 1894 (1064, R. S. 1881), as to the question of possession and damages. Appellee's counsel insists that a new trial as of right in actions for possession is given by the letter of the statute, *supra*, as construed by this court in *Campbell v. Hunt*, 104 Ind. 210; *Butler University v. Conard*, 94 Ind. 353, and, it is further urged, that if such new trial is not given where the element of title has been conceded to the plaintiff by the defendant's disclaimer, the new trial granted in this case was harmless, since the judgment upon the second trial, as to title, was for the appellant, and not different from the first judgment.

It certainly cannot be that the appellant would not be harmed by a new trial resulting in a judgment against him upon a branch of the case in which a new trial was not allowable, and in which he had recovered upon the first trial. If a new trial as of right, where the question is one only of possession, is not allowable, it would be manifestly unjust and harmful to grant such new trial.

Our inquiry, therefore, must be directed to the ques-



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tion as to whether such new trial is given where the element of title is not involved.

It is well understood that we have two actions involving the right to the possession of real estate, one where title is not an essential element, as where the relation of landlord and tenant exists, and the other is that given by section 1062, *et seq.*, Burns' R. S. 1894, for ejectment. The present action must rest upon this statute, and the rights of the parties must be considered with reference to it. Section 1062, *supra*, provides that, "Any person having a valid subsisting interest in real property and a right to the possession thereof may recover the same by action to be brought against the tenant in possession; if there is no such tenant, then against the person claiming the title or some interest therein." Sections 1063, 1064 and 1065, clearly indicate that the word "tenant" thus employed has reference, not to the tenant of the plaintiff, but to the tenant of the one claiming an adverse title or interest to that claimed by the plaintiff. Section 1066, relating to the allegations of the complaint, continues the intention of adverse or hostile claims of interest or title. Section 1068 provides that where a defense is made, proof of possession is unnecessary; thus, leaving open for determination the issue as to the right to such possession, which could only involve the inquiry as to the alleged "valid subsisting interest in" the land. That this right to possession involves more than a simple right of occupancy, and that it includes an interest in the land in the nature of title, is shown by the provision of section 1069, Burns' R. S. 1894, that "The plaintiff must recover on the strength of his own title."

Another action provided in connection with that mentioned, is to quiet the title where no question of possession is requisite. Section 1082, Burns' R. S. 1894.

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As a part of the system of procedure adopted with reference to the two actions so provided, it has been further provided, that a new trial of right may be awarded, section 1076, Burns' R. S. 1894, and under this provision it has been held frequently that in either of the actions mentioned such new trial may be had. *Shuman v. Gavin*, 15 Ind. 93; *Earle v. Peterson*, 67 Ind. 503; *Physio-Medical College v. Wilkinson*, 89 Ind. 23; *Hammann v. Mink*, 99 Ind. 279; *Anderson v. Anderson*, 128 Ind. 254; *McAllister v. Henderson*, 134 Ind. 453; *Campbell v. Hunt*, *supra*; *Butler University v. Conard*, *supra*.

We think it is manifest that the provision as to new trials was intended to enable those whose titles may be in issue and adjudged upon to obtain a second hearing, and that it was not intended to extend this right where the issue and judgment involved but the naked question of possession, with or without damages, and where title was not in question.

The disclaimer to the first paragraph of complaint had the effect to confess the cause of action pleaded in said paragraph, and so far as the element of title was tendered as an issue by the second paragraph of complaint, the answer in disclaimer filed thereto had likewise the force of a confession as to that issue. *McCarnan v. Cochran*, 57 Ind. 166; *McAdams v. Lotton*, 118 Ind. 1.

In the latter case, an action in ejectment, the defendant filed a disclaimer, and it was said, "that a disclaimer is a confession of the cause of action, and operates to preclude the plaintiff from prosecuting his case beyond a judgment awarding him possession and damages."

A disclaimer would certainly be not less effective in this respect than a default, and it has been held

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that in ejectment a default admits the cause of action, and precludes a new trial as of right. *Fisk v. Baker*, 47 Ind. 534.

There can be no new trial as of right, therefore, of any issue confessed, and the issue here confessed takes out of the case all inquiry as to title or interest in the land. The issue so confessed is an essential issue in the class of cases wherein a new trial as of right is given.

The confession reduced the issue to a mere inquiry as to whether the appellee was in possession, holding against the appellant, to his damage. This theory is probably as favorable as the appellee could ask, since his denial of possession might, with much force, be urged as a concession that even in respect to possession no rights were claimed adverse to those of the appellant.

The cases of *Campbell v. Hunt*, *supra*, and *Butler University v. Conard*, *supra*, do not hold that a new trial as of right is permitted where adverse claims of title are not in issue. Where it is said in those, or other cases, that such new trial is permitted in actions for possession, it must be implied that such actions are those contemplated by the statute to which we have referred, and not that it is allowable in actions for possession, regardless of the issue as to "a valid subsisting interest."

It follows, from what we have said, that the trial court erred in granting to the appellee a new trial as of right. The judgment is reversed, with instructions to the trial court to overrule the appellee's motion for a new trial as of right.

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148	578
149	138
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THE TERRE HAUTE AND INDIANAPOLIS RAILROAD  
COMPANY v. MASON.

[No. 17,922. Filed Feb. 24, 1897. Rehearing denied Oct. 27, 1897.]

**MALICIOUS PROSECUTION.—Probable Cause.—Burden of Proof.**—In an action for malicious prosecution the burden is on plaintiff to show that at the time the prosecution complained of was instituted there was no probable cause for prosecution, and that the same was malicious. *p. 581.*

**SAME.—Necessary Proof.**—The inquiry in an action for malicious prosecution must be, not whether the plaintiff was or was not guilty of the offense for which he was prosecuted, but whether, at the time when the prosecution began there was or was not probable cause for bringing it, and whether defendant acted with or without malice. *p. 582.*

**SAME.—Defense.—Probable Cause.**—Where in an action for damages for malicious prosecution the one charged with having instituted such prosecution can show that his conduct at the time was such as a reasonable and prudent man would be likely to exhibit under like circumstances, it will be sufficient to defeat a recovery. *pp. 582-584.*

**SAME.—Grand Jury Indictment.—Burden of Proof.**—Where in an action for malicious prosecution the prosecution was not instituted on the affidavit of the prosecuting witness, but all of the information was placed in the hands of the prosecuting attorney and by him laid before the grand jury, the burden is upon plaintiff to show that the defendant was the prosecutor, and that the prosecution was without reasonable or probable cause. *pp. 586, 587.*

**SAME.—Grand Jury Indictment.—Probable Cause.**—A grand jury indictment is not conclusive evidence, but may be considered along with other facts found by the jury in the trial of a case of malicious prosecution, for the purpose of showing whether or not there was probable cause shown. *p. 587.*

**SAME.—Defense.—When Prosecution Instituted by Advice of Attorney.**—Where in an action for malicious prosecution it is shown that defendant, before instituting such prosecution, consulted an attorney, placed all the facts before him fully and fairly, and acted upon his advice, such proof makes out a case of probable cause. *p. 588.*

**SAME.—Advice of Counsel.**—The fact that the general manager of a railroad company who supervised and directed a prosecution for

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such company was himself a lawyer would in no way affect the defense of such company in an action for malicious prosecution that it, through such general manager, sought the advice of an attorney in reference to such prosecution, and acted thereon. *pp.* 588, 589.

**SAME.**—*Special Findings.*—A finding by the jury in a trial for malicious prosecution that such prosecution was maliciously brought by the railroad company is inconsistent with the finding that the action of the officer of the company who directed all of the proceedings on the part of the company was without "any hatred, ill will or malice toward the plaintiff." *p.* 590.

From the Clinton Circuit Court. *Reversed.*

*Bayless, Guenther & Clark* and *T. J. Golden*, for appellant.

*John C. Farber, Claybaugh & Claybaugh* and *Gavin, Coffin & Davis*, for appellee.

**HOWARD, J.**—This was an action by appellee against appellant, to recover damages for alleged malicious prosecution. The jury returned a special verdict by way of answers to eighty-one interrogatories submitted to them, and the court rendered judgment thereon in favor of the appellee. The errors assigned on the appeal are, (1) the overruling of the demurrer to the complaint; (2) the overruling of the motion made by appellant for judgment upon the verdict; (3) the overruling of the motion for a new trial, and (4) the overruling of the motion in arrest of judgment.

As to the first alleged error, it is perhaps enough to say that we find the complaint sufficient.

The appellee had been for about eleven years in the employment of the appellant company. During the last four or five years of which time he had been brakeman on one of appellant's passenger trains.

In February or March, 1894, it became known to the officers of the appellant company that certain tickets, known as "last end mileage books" were being

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wrongfully sold to a ticket broker in the city of St. Louis. After an investigation, the officials of the company became satisfied that the tickets so wrongfully disposed of had been taken up on trains running from Indianapolis to St. Louis, on which trains a Mr. John R. Wise was conductor, and the appellee was brakeman. It was the custom for this conductor, after collecting the tickets and "last end mileage books" from passengers, to turn the same over to his brakeman, the appellee, who enclosed the same in paper envelopes, sealing the envelopes and marking on the outside the number and kind of tickets in each. The whole were then placed by the brakeman in a large paper bag, and addressed to the proper accounting officers of the road. For some unexplained cause, the conductor was not in the habit of canceling the "last end mileage books" taken up by him and turned over with other tickets to the brakeman. It was these uncanceled last end mileage books that were found absent from the paper bags when the same were opened by the accounting officers; and these were also the tickets that were found in the hands of the ticket broker at St. Louis.

The officers of the appellant company do not seem to have suspected Conductor Wise; but, from information professed to have been obtained through detectives, their suspicion appears to have rested wholly upon appellee, the brakeman. The conductor had been in the service of the company and in charge of passenger trains for nearly twenty-seven years, and the utmost confidence was reposed in him. He was accordingly taken into the counsels of the officials of the company in pursuing their investigations in this matter, and was instructed to continue as heretofore to turn over tickets to the brakeman, the conductor, however, to keep an account of such tickets. The con-

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ductor's report, so kept, being compared with the tickets returned by the brakeman, it was discovered that last end mileage books so reported were not found in the sealed bags returned by the brakeman. After consulting with attorneys, and continuing the investigation for several weeks, the case was laid before the assistant prosecuting attorney of the city of St. Louis, who, in turn, laid it before the grand jury of said city.

On July 27, 1894, the grand jury returned an indictment against the appellee for fraudulently selling railroad tickets, and he was arrested on the same day and committed to jail, where he remained until July 30, 1894, when he gave bond for his appearance before the St. Louis criminal court, from day to day during the July term, 1894, and on the first day of each term thereafter to which said cause might be continued. On May 17, 1895, the appellee was tried by a jury of said court, and was duly acquitted and discharged.

On August 8, 1895, the appellee, having been refused reinstatement in his employment, or any compensation for loss sustained, brought this action to recover damages resulting to him by reason of the alleged malicious prosecution instituted by appellant.

For appellee to recover, it was necessary, besides his acquittal, for him to show that, at the time the prosecution was instituted against him, the appellant did not have probable cause for bringing such suit, and that the same was malicious. This is one of the cases in which a plaintiff must prove a negative. The action will not lie unless there was a want of probable cause, and such want of probable cause must therefore be shown by the plaintiff. The burden is not upon the defendant to show that there was such probable cause and that he acted without malice. If, however, the defendant does show the existence of such

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probable cause, or that there was no malice in bringing the suit, then, of course, even though it should turn out that the plaintiff had been acquitted of the charge, there could still be no recovery by him, unless for costs. Cooley, Law of Torts, 180.

It is true that before the action for damages can be successful, it must be shown that the plaintiff has been acquitted of the crime charged, or the action otherwise terminated in his favor. Such acquittal, together with the presence of malice and the absence of probable cause, is a necessary circumstance to justify the bringing of the action for damages. Cooley, Torts, 181. But the acquittal of the plaintiff has no further relation to the action for damages. The inquiry must, therefore, be, not whether the plaintiff was or was not guilty of the offense for which he was prosecuted, but whether, at the time when the prosecution began, there was or was not probable cause for bringing it, and whether the defendant acted with or without malice.

A mere belief, however, that probable cause exists, as said by Mr. Cooley, is not sufficient. "One may believe on suspicion and suspect without cause, or his belief may proceed from some mental peculiarity of his own; there must be such grounds of belief as would influence the mind of a reasonable person, and nothing short of this could justify a serious and formal charge against another. Still, some allowance must be made for the excitement under which prosecutions for supposed offenses against the complainant himself are almost necessarily instituted. The complainant cannot be required to act with the same impartiality and absence of prejudice in drawing his conclusions as to the guilt of the accused that a person entirely disinterested would deliberately do, any more



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than a person assaulted could be expected to judge of his danger with the like coolness and impartiality. And all that can be required of him is, that he shall act as a reasonable and prudent man would be likely to act under like circumstances." Cooley, Torts. 182.

We may think now, in the light of all the facts as since brought out and shown in the record, that an injustice was done to an honest man. We may even be of opinion that the appellant company did not fairly treat the brakeman after he had been acquitted of the charge against him. The appellant, even if unwittingly, had yet brought upon the appellee unmerited trouble, expense, and mortification. Confined in jail at first, and then placed under bond for nearly a year, as soon as he was acquitted, he went, as an honest man might do after his vindication, and asked to be returned to the favor of the company, and to the employment in which he had so long and so well served; but his advances were repulsed, and he was compelled to seek his livelihood elsewhere. This treatment may seem unjust. But that is a question of morals, and not of law. We are simply to consider whether, at the time the proceedings were instituted against him, there was probable cause for the action taken by the officers of the company. He was, indeed, duly acquitted of all charges. But, as already said, the question is not as to whether he was innocent or guilty. Neither is it a question as to whether the officers of the company acted fairly towards him after his acquittal. We have to go back of all this, and consider what the verdict shows as to whether, at the time of bringing the charges, the officials had probable cause for so doing, and acted without malice.

One who is charged with an assault and battery, or like offense, may show that, at the time of committing the act charged, he had good reason to believe, and did

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believe, that he was in danger of death or great bodily harm; and the fact that he was, at the time, not in any such danger will not make his defense bad, provided only, the circumstances were such as to show that he had then good reason to believe that he was in actual peril, which peril could be avoided only by the action taken by him. So, in a case of malicious prosecution, which is *quasi* criminal in its character, if the one charged with having instituted such prosecution can show that his conduct at the time was such as a reasonable and prudent man would be likely to exhibit in like circumstances, it will be sufficient to defeat a recovery for damages.

The facts found by the jury, and bearing upon the issues before the court were the following, given in a connected and narrative form:

The indictment of the appellee, and his arrest, imprisonment, the giving of bond, trial, and acquittal, are first stated in the verdict. It is found that, prior to his indictment, the appellee was a man of good reputation for honesty and integrity; that he had been employed as passenger brakeman by the appellant for four or five years, on trains running from Indianapolis to St. Louis, John R. Wise being conductor on such trains; that appellee, while so employed, and prior to this prosecution, was held in high esteem by the officers of the appellant company. The jury also find that John G. Williams, vice president and general manager of the company, after hearing of the wrongful disposal of certain railroad tickets, began an investigation into the matter, from which he received information that the tickets so disposed of had been used by passengers riding on trains on which appellee was brakeman and Wise was conductor; that Wise had been in the service of the railroad for twenty-five years, and the officers of the company had the utmost

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confidence in his honesty and integrity; that appellee, according to the custom observed on his trains, received from the conductor all the tickets and mileage books collected on the train, and placed them in envelopes furnished by the appellant, endorsing also on such envelopes the tickets and mileage books so enclosed, and then delivered the same to the baggage master of his train, which envelopes were given at the end of each trip to the auditor of the company; that after the investigation began, John G. Williams caused the conductor to make reports of all "last end mileage books" taken up by him and turned over to appellee; that by comparing such reports of the conductor with those made by the appellee it was discovered that certain last end mileage books reported by the conductor were not found in the envelopes returned by the appellee, nor in the reports endorsed thereon by him. It is further found that John G. Williams, in instituting the prosecution against the appellee, relied and acted upon facts and circumstances which had come to his knowledge and the knowledge of other officers of the railroad company; that such officers, in the proceedings taken, acted in the discharge of their duties to the company; that prior to such prosecution John G. Williams never entertained any hatred, ill will, or malice toward appellee; that in the latter part of March, 1894, Williams consulted with his attorney, E. W. Pattison, a reputable lawyer of eminence and good standing in the city of St. Louis, and placed all the facts within his knowledge before the said Pattison; that Pattison did not advise that such facts would justify a prosecution of appellee, under the laws of Missouri; that, after such consultation, Williams continued his investigations for the purpose of finding who it was that was engaged in wrongfully disposing of said last end mileage tickets; that he caused conductor

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Wise to make reports of all such tickets taken up and turned over to appellee during April and the first twenty-four days of May, 1894; that before the commencement of proceedings for the prosecution of appellee all the facts connected with the wrongful disposal of said last end mileage books, within the knowledge of the officers of the railroad company, were submitted in good faith to Jesse A. McDonald, the assistant prosecuting attorney of the city of St. Louis, whereupon the said prosecuting attorney advised that such facts would warrant and justify the prosecution of appellee, under the laws of the state of Missouri; and that said prosecuting attorney, in presenting the case to the grand jury, acted exclusively upon the facts and circumstances detailed to him by the officers, employees, and attorneys of the appellant.

This is not the case of a private person arresting or aiding in the arrest of another without warrant, on a criminal charge. The action in such a case would be for false imprisonment; and to justify such private person in making or aiding in such arrest, as said by Andrews, J., in *Farnam v. Feeley*, 56 N. Y. 451, it must appear that a felony had in fact been committed, and the burden is upon him to show "that he acted circumspectly and upon grounds which would have justified a careful and prudent person in believing that the person arrested was guilty of the crime."

Neither is it even a case as in *Flora v. Russell*, 138 Ind. 153, 33 Am. Law Reg. and Rev. 591, to which we are cited, where a prosecution was instituted on the mere affidavit of the prosecuting witness himself. In the case at bar, the whole matter, together with all information in possession of the officers of the company, was placed in the hands of the prosecuting attorney, and was by him laid before the grand jury. No arrest was made but upon indictment by that body.

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In such a case the action is for malicious prosecution, and the burden "is upon the plaintiff to show that the defendant was the prosecutor, and that the prosecution was without reasonable or probable cause." *Farnam v. Feeley, supra*.

The burden, therefore, being upon the appellee, in the case at bar, to show malice and want of probable cause on the part of the appellant in instituting the prosecution against him, it must be apparent, from the findings above set out, that he failed to sustain his action. Moreover, while the appellant was not required to show probable cause and freedom from malice, the burden of showing the contrary being upon the appellee, yet the verdict does in fact show that the appellant proceeded without malice, and with reasonable grounds for the action taken, in laying the case before the prosecuting attorney.

It is true that an indictment, unlike a conviction, is not conclusive, but only presumptive evidence of probable cause, *Townshend, Slander and Libel* (4th ed.), section 426; *Scotten v. Longfellow*, 40 Ind. 23; yet, taking this in connection with other facts found by the jury,—the freedom from malice of the general manager who conducted the investigation; the fact that the officers of appellant, in all that they did, acted in discharge of the duties of their employment, relying in good faith upon the facts and circumstances that came to their knowledge; the fact that tickets taken upon the train of appellee were wrongfully disposed of, and that it seemed reasonable, from the report of the conductor and from other circumstances detailed in the verdict, that appellee should have been the wrongdoer,—we cannot see that probable cause was not shown; even though it afterwards appeared on the trial that the appellee was not guilty. "It would be a terrible thing," said Lord Mansfield, as cited in *Burns*

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v. *Erben*, 40 N. Y. 463, "if, under probable cause, an arrest could not be made \* \*"; many an innocent man has and may be taken up upon suspicion; but the mischief and inconvenience to the public in this point of view, is comparatively nothing; it is of great consequence to the police of the country."

The fact, too, that, on consultation with attorney Pattison, in March, the company was advised that the facts known at that time would not justify prosecution; and that the investigation was then continued through April and May, and the case again presented for legal advice, and this time to the prosecutor of the State, who advised that the facts showed good cause for laying the case before the grand jury, is additional reason to show that appellant's officials proceeded prudently and without undue haste to try, in good faith, to discover the truth. Not until July thereafter was the matter finally laid before the grand jury by the prosecutor, and a true bill found. It is an act of prudence, as said in Cooley's Law of Torts, '184, to take the advice of counsel in such cases, "not only because it is the advice of one who can view the facts calmly and dispassionately, but because he is capable of judging of the facts in their legal bearings." And "when he does so," as the author continues, "and places all the facts before his counsel, and acts upon his opinion, proof of the fact makes out a case of probable cause, provided the disclosure appears to have been full and fair, and not to have withheld any of the material facts." The finding here was that, "Before the prosecution, all the facts within the knowledge of the officers of the railroad company" were submitted to the prosecuting attorney, and that he then advised the prosecution.

It seems to be contended, or at least suggested, that advice of counsel is for laymen, and that John G. Wil-

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liams, general manager, who supervised and directed the prosecution, being himself a lawyer of well known ability, was not entitled to be protected in his action by the advice of counsel. The rule of law, however, is applicable to all persons in the like circumstances; and one who, for himself, or as agent for another, is personally concerned in the bringing or defending of an action, is always in need of "the advice of one who can view the facts calmly and dispassionately," no matter whether he be himself an attorney at law or not. A lawyer who takes himself for a client has not usually been regarded as acting wisely.

But it may be said that there were numerous other answers by the jury to interrogatories, and some of them in conflict, or at least in seeming conflict, with those above set out. The appellee, however, had the burden of proving his own case; and if any of the facts returned by the jury should be found in conflict with those here set out, there would, at most, be a contradiction, one finding neutralizing another; and, to that extent, the appellee would have failed in making out his case. This is not a case where there is a general verdict for the plaintiff, and where, consequently, any competent evidence would be sufficient to sustain the verdict. Here, in order that the plaintiff should recover, the special verdict must show, without intendment, a case made out for the plaintiff and whatever he was bound to establish, and which is not found in his favor must be held to have been found against him. But, in several instances, we think, the conflict is but seeming. For example, the jury find that the case, as presented to Attorney Pattison, was by him presented to Judge Jones, "a reputable lawyer of eminence and good standing," and that Mr. Jones did not advise prosecution. There is nothing in the finding or in the verdict to show that the facts so pre-

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sented were not the same as presented to Mr. Pattison himself, "in the latter part of March, 1894." The investigation, however, as we have seen, was pursued through April and May; and when the case was finally presented to the prosecuting attorney, his advice was that the facts were sufficient. Besides, in a criminal prosecution, we are not able to see why a prudent man might not rightfully prefer to take the advice of the prosecuting attorney, whose special business it is to investigate and try such matters.

The jury also found that the prosecution was "maliciously" brought by the appellant company. The company, however, must act through its officers and agents; and the finding that the company acted with malice is inconsistent with the findings as to the reasonable and proper conduct of the officers; and it was particularly found that the action of Mr. Williams, who directed all the proceedings on the part of the company, was without "any hatred, ill will, or malice toward the plaintiff."

The jury found also that there was not "any probable cause for the prosecution." This is but a conclusion, a conclusion of law for the court in case the facts are not in dispute; and if it were a conclusion of fact, the facts found from which the conclusion should be drawn, in case of doubt, themselves show, as we have seen, that there was probable cause; even though the trial disclosed that the appellee was in fact innocent.

Other findings are mere matters of evidence, and are out of place in the verdict. It is a great abuse of the statute authorizing special verdicts by way of answers to interrogatories, and wholly inexcusable, to unduly multiply interrogatories, and thus confuse the mind of the jury, and bury the few material facts of a case in a mass of verbiage.

The contention that the evidence does not support



## Baldwin v. Sutton et al.

the issues as found for the appellant cannot be sustained. On the contrary, many of the findings for the appellee are without sufficient support in the evidence.

As the material facts in issue, as found by the jury, show that the appellant did not act from malice or without probable cause, it follows that the court erred in entering judgment for the appellee. The judgment is therefore reversed, with instructions to enter judgment on the verdict in favor of the appellant.

## BALDWIN v. SUTTON ET AL.

[No. 18,221. Filed September 15, 1897. Motion to set aside opinion denied October 28, 1897.]

**APPEAL.—Assignment of Error.**—The appellant must, by proper assignments, specify with reasonable certainty the rulings of the lower court upon which he relies and desires reviewed; such assignments must be supported by the record, and no error, not so assigned, can be made available. *pp. 593, 594.*

**SAME.—Assignment of Error.—Costs.**—An assignment of error calling in question the decision of the trial court as to costs, presents no question on appeal, where there was no motion in the trial court to modify or correct the judgment. *p. 594.*

**SAME.—Motion to Recall Opinion That Assignment of Errors Might be Amended.**—A motion that the Supreme Court recall its opinion in favor of the appellee in order that appellant may amend his assignment of errors, as provided by rule three of the Supreme Court, will be denied where it does not appear that due diligence in the preparation of the assignment was exercised in the first instance, and no excuse is shown for the failure to make the application earlier. *p. 595.*

From the Cass Circuit Court. *Affirmed.*

*D. P. Baldwin and McConnell & Jenkins, for appellant.*

*Geo. C. Tabor and McConnell & McConnell, for appellees.*

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150	290
148	591
162	484
162	491
148	591
165	644
148	591
168	558

JORDAN, J.—The record in this appeal shows that appellant, plaintiff below, filed two amended paragraphs to his original complaint, being denominated as first and second. Under his first amended paragraph he demanded that the appellee, Homburg, as sheriff, be restrained from paying over to appellee Sutton, the money arising out of the sale of certain real estate at sheriff's sale. By the second, he demanded an accounting, and that appellee, Homburg, pay into court a certain amount of the proceeds of such sale, and that he be perpetually enjoined from paying said money over to Sutton. Appellee, Sutton, separately demurred to the amended first and second paragraphs of the complaint, and Homburg separately demurred to each paragraph of the amended complaint. These demurrers were each overruled. Separate answers were then filed by each of the appellees. Appellant then demurred to the second and third paragraphs of each of these separate answers. Subsequently Sutton filed additional paragraphs to his answer, numbered four, five, six, and seven, and appellant filed a demurrer to each of these additional paragraphs. Subsequent to the filing of this last demurrer by appellant, the following appears in the record: "The court does now carry back to the complaint the demurrer heretofore filed by plaintiff to the answer of Charles W. Homburg, and to the answer of John F. Sutton, and does now sustain each of said demurrers to each paragraph of the plaintiff's amended complaint, to which ruling of the court the plaintiff does now except." Thereupon, it appears that judgment was rendered against appellant for cost. The only errors assigned by the appellant are the following:

"*First*—The court below erred in sustaining appellees, Sutton and Homburg's demurrer to the first paragraph of appellant's complaint, which ruling and error was excepted to at the time.

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"*Second*—The court below erred in sustaining the demurrer of appellees, Homburg and John F. Sutton, to the second paragraph of the appellant's complaint, which ruling was excepted to at the time.

"*Third*—The court below erred in rendering judgment against this appellant and in favor of John F. Sutton and Charles W. Homburg, sheriff of Cass county, Indiana, for costs."

At the very threshold, we are confronted with the insistence of counsel for appellees, that under the first and second assignment, the record does not present anything for our consideration upon the merits of the case. The record discloses that the only demurrers filed by appellees Homburg and Sutton to the complaint were separate and not joint, and that these demurrers were directed to the amended complaint, and were each overruled, and an exception reserved in favor of appellees. Therefore, the first and second assignments do not apply to the ruling of the court upon either of these demurrers. The record does not exhibit any such ruling of the court, as is alleged and specified by appellant in his first two assignments. If he relies upon the action of the court in carrying back his demurrer to the separate answers of appellees and sustaining it to each paragraph of the complaint, he should have specified such ruling as the one upon which he based his assignment of error. See Elliott's App. Proced., section 340; *Stockwell v. State*, 101 Ind. 1; *Hunter v. Fitzmaurice*, 102 Ind. 449; *Peters v. Banta*, 120 Ind. 416.

We are not authorized to presume in favor of a suitor and apply his assignment of errors, which is deemed to be his complaint in this court, to rulings or decisions of the trial court, which are not specifically referred to or embraced in such assignment. The law

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of appellate procedure requires the complaining party to specify with reasonable certainty the rulings of the lower court upon which he relies and desires reviewed, and such assignment must be supported by the record, and no error, not well assigned, can be made available. Elliott's App. Proced., sections 186 and 306; *Indiana, etc., R. W. Co. v. McBroom*, 98 Ind. 167; *Robbins v. Masteller*, 147 Ind. 122.

In *Peters v. Banta*, *supra*, it is said: "It is contended, in the argument of counsel for appellants, that the court should have carried the demurrer of the appellee to the sixth paragraph of the appellant Ream's answer back, and sustained it to the complaint, and that, in effect, the demurrer to the answer was a demurrer to the complaint. Conceding, as a matter of argument, that the position of counsel is correct, he should have assigned an error in this court, thus presenting the question; no such error has been assigned."

Appeals to this court are tried by the record. It furnishes the evidence to sustain the errors of which an aggrieved litigant complains, and when the specific assignment of errors, upon which he relies, is not applicable to the rulings as shown by the record, nor supported thereby, the appeal must fail. Elliott's App. Proced., sections 186 and 306; *Shaw v. Spencer*, 33 Ind. 143; *Campbell v. State*, *ante*, 527. The burden is upon a complainant in this court to show by a proper record, first of all, that the ruling or decision specified in his assignment, was made in the lower court. The third assignment seeks to call in question the decision of the court in adjudging cost against appellant. There was no motion to modify or correct the judgment, in this respect, in the lower court, hence this assignment presents no question for our decision. *Kissell v. Anderson*, 73 Ind. 485; *Chicago, etc., R. W. Co. v. Eggers*, 147 Ind. 299, and the authorities there cited. Of course our

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holding herein is not to be extended so as to deny the right of a party to parry an attack upon the sufficiency of his answer, on the ground that a bad answer is sufficient for a bad complaint.

For the reason herein stated we cannot review the questions discussed in appellant's brief, and the judgment is therefore affirmed.

ON MOTION TO SET ASIDE OPINION.

PER CURIAM.—The appellant moves the court to recall its opinion herein that he may amend his assignment of errors. Affidavits in support of the motion undertake to excuse the negligence of the appellant and his counsel, in failing to seek a correction or amendment of the assignment after the submission of the cause, and after the filing of briefs for the appellee, but there is an utter failure to excuse the lack of care and diligence in the first instance to make the assignment complete.

Rule three of this court provides that "Amendments of the assignment of errors shall not be made after the cause is submitted, except upon notice and leave applied for in writing, nor shall leave be granted unless it appear that due care and diligence were exercised in the first instance to make the assignment complete."

We should not withdraw our opinion to permit additional steps, if there were a sufficient excuse for failing to apply earlier, where it does not appear that such steps were authorized, and were probably available. From anything appearing in the motion, we cannot say that appellant could amend his assignment, under the rule quoted.

Upon the question of diligence in seeking an earlier amendment, it may be said that, in the present ad-

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Carson, Administrator, v. Eickhoff.

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vanced condition of this court's docket, a matter about which counsel and litigants must advise themselves, more diligence and attention to the status of cases is required than when, with the greatest diligence, an appeal could not be determined under eighteen months. Nor is it an excuse for negligence to suppose that the members of the court are not engaged during the summer adjournment of the court in preparing opinions in pending causes. Not only are opinions written during that period, but the appellant and his counsel were notified by the clerk, as their affidavits disclose, that this cause had been distributed in the month of August. The motion is overruled.

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CARSON, ADMINISTRATOR, v. EICKHOFF

[No. 18,012. Filed October 20, 1897.]

**MORTGAGES.—Recording.—Priority.—Statute Construed.**—A *bona fide* real estate mortgage taken for a valuable consideration, which has been recorded within forty-five days as provided by section 8350, Burns' R. S. 1894 (2981, R. S. 1881), takes precedence of a mortgage taken five days before, but not recorded within the statutory period.

From the Marion Superior Court. *Affirmed.*

*Oliver H. Carson*, for appellant.

*Lucius B. Swift*, for appellee.

HACKNEY, J.—The principal question in this case is as to the seniority of the mortgage liens of the appellant Carson, administrator of Ivy Hansley's estate, and the appellee Eickoff, respectively.

The mortgage to the appellant's decedent was executed May 2, 1895, and was recorded July 15, 1895,

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Carson, Administrator, v. Eickhoff.

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more than seventy days after its execution. The mortgage to the appellee was executed May 7, 1895, was recorded May 11, 1895, and was taken by him to secure a valid loan made to the mortgagor on said 7th day of May, 1895, which loan was made and said mortgage was taken without any knowledge whatever of the existence of the mortgage so theretofore executed.

The statute, section 3350, Burns' R. S. 1894 (2931, R. S. 1881), reads as follows: "Every conveyance or mortgage of lands or of any interest therein, and every lease for more than three years, shall be recorded in the recorder's office of the county where such lands shall be situated; and every conveyance or lease not so recorded in forty-five days from the execution thereof, shall be fraudulent and void as against any subsequent purchaser, lessee or mortgagee in good faith and for a valuable consideration."

The appellant's contention is that under this statute the second mortgage, in point of time of execution, does not take precedence, unless it is executed after the lapse of the forty-five days provided for the recording of the mortgage first executed.

Why the legislature should have intended to place the holder of the second mortgage in a less favorable position because of his having taken his mortgage before the limit of the time prescribed for the recording of the older mortgage than he would have occupied in taking it after the forty-five days, we do not comprehend. His mortgage is given priority by reason of his good faith in taking it, and because of the laches of the holder of the older mortgage. He is in no position to act with reference to the time when the first mortgage is executed, since a knowledge of the time of its execution deprives his transaction of its good faith. That this mortgage is taken after the forty-five days from the execution of the first mort-

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Carson, Administrator, v. Eickhoff.

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gage would not increase his equities, and to have taken it before, certainly could not diminish them. When the *bona fides* of his mortgage is established, its seniority is declared by reason of the laches of the first mortgagee in failing to comply with the recording statute. The first mortgage is made "fraudulent and void as against any subsequent \* \* \* mortgage in good faith," etc.

The command of the statute is that a mortgage shall be recorded. Time is not a part of the command, and it has always been held that it is valid, as to the mortgagor, regardless of the time of recording. But, that the rights of innocent, subsequent mortgagees for value may not be defeated by unreasonable delay and that they may not be precluded from dealing with reference to the property, the statute in effect provides that if a mortgage is not recorded within forty-five days from its execution, the lien thereof shall not relate back to the date of execution so as to defeat a mortgage prior in time but recorded as required. Here, there is no question of the validity of the appellee's mortgage; it was executed and received in good faith, and was recorded within the time which establishes the lien thereof from its date. The lien of the appellant's mortgage relates to the time of the recording thereof, inasmuch as it was not recorded within the period entitling it to relation back to its date. See *Schaeffer v. Fithian*, 17 Ind. 463.

Very clearly, therefore, the appellee's mortgage is senior as a lien, and the lower court's decision was correct.

The judgment is affirmed.



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Bray, Admr, *et al.* v. The First Avenue Coal Mining Co. *et al.*

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BRAY, ADMINISTRATOR, ET AL. v. THE FIRST AVENUE  
COAL MINING COMPANY ET AL.

[No. 18,122. Filed October 29, 1897.]

**PRINCIPAL AND SURETY.—*Mortgages.***—Where sureties on a note executed by a mining company to a bank, made payments on such note, and renewal notes signed by all of the parties were given to the bank for the balance due, and a note executed by the principal to each surety for the amount paid by him, such payments will not be treated as loans to the principal, but as payments on the note upon which they were sureties and are covered by a mortgage given by the principal, to indemnify them as such sureties.

**LIMITATION OF ACTIONS.—*Notes Secured by Mortgage.—Indemnifying Mortgages.***—Where an indemnifying mortgage was executed to secure sureties on note of principal, and afterward such sureties pay the note secured by them and take the principal's note for the amount so paid, such note is subject only to the statutes of limitations applicable to any notes secured by mortgage.

**MORTGAGES. — *Secures the Debt, Not the Evidence of the Debt.***—A mortgage secures the debt, and no matter what changes are made in the form of the evidence of such debt, the mortgage still remains good as security therefor.

From the Vanderburgh Superior Court. *Reversed.*

*Garvin & Cunningham, William M. Blakey, Mattison & Posey and Gilchrist & DeBruler, for appellants.*

*J. E. Williamson, G. K. Denton, R. C. Wilkinson, A. J. McCutchan and N. G. Lindley, for appellees.*

HOWARD, J.—The appellant, James D. Parvin, was appointed receiver of the appellee mining company, and by order of court sold the property of said company for \$4,250.00. The matters here in controversy have relation to certain liens upon said fund claimed by the appellant Madison J. Bray, as administrator, and the appellee, Charles E. Pittman.

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Bray, Admr., *et al.* v. The First Avenue Coal Mining Co. *et al.*

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From the finding of the court it appears, that on February 11, 1888, the appellee mining company executed to Cicero Buchanan, the appellant Bray's decedent, and to the appellee Pittman and others, a mortgage upon its real estate and other property; that at the time of the execution of said mortgage, the mortgagees therein named were liable as sureties upon the company's note therein described, to the People's Savings Bank of Evansville, in the sum of \$3,000.00, and that said mortgage was given to secure said mortgagees as such sureties; that successive renewals of said note were made to said bank by said mining company, all of which renewals were secured by said mortgagees, and payments were made by said company at each renewal, until the 9th day of April, 1888, when the indebtedness was reduced to \$1,500.00; that about April 11, 1888, the said Buchanan, Pittman, and the mortgagee, William S. Pollard, being the only sureties on said note who were then solvent, agreed among themselves and with said mining company, to each pay \$500.00 on said \$1,500.00 note whenever required by said bank, and that when said payments should be made the mining company should execute its notes in like amount to those sureties making such payments, as additional security for the sums so paid, each of said additional security notes to be itself secured by all the aforesaid mortgagees, other than the payee thereof; that in pursuance of said agreement the mortgagee Pollard, on April 17, 1888, paid to the president of the mining company the sum of \$500.00, to be applied on said \$1,500.00 note; and said \$500.00 was at said date paid to said savings bank, and the note renewed by all the parties for \$1,000.00, Pollard also receiving his additional security note as agreed; that on February 23, 1889, the mortgagee, Buchanan, in like manner, paid his \$500.00, as agreed, which was

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Bray, Admr., *et al.* v. The First Avenue Coal Mining Co. *et al.*

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on the same day applied on the savings bank debt and the note renewed by all the parties for \$500.00; Buchanan also receiving his additional security note for such payment; that on January 9, 1892, the mortgagee, Pittman, furnished his \$500.00, to apply upon said indebtedness, which on said day was paid to said bank, thus paying in full the indebtedness to the bank; Pittman likewise receiving his additional security note. It would seem that the mining company kept up the interest due the bank, until the final payment of the debt. The court finds that the company also regularly paid to the three sureties the interest on the several amounts paid by them to the bank, paying to Pollard his interest to October 17, 1895; to Buchanan his interest to February 23, 1895; and to Pittman his interest to November 9, 1895; and that the amount due to each, principal, interest and attorney's fees is: To Pollard, \$576.09; to Bray, as administrator of Buchanan, now deceased, \$604.57; and to Pittman, \$572.42. It is found, in addition, that the payments by Buchanan and Pollard were made more than six years before the bringing of this action, and more than six years before the death of Buchanan.

The conclusions of law by the court were: *First*, That Charles E. Pittman ought to recover of the mining company the sum of \$500.00 with interest from January 9, 1892, and his costs. And that said sum is secured by the mortgage named in the findings, and is a lien upon the property therein described, and that the lien of said mortgage ought to be preserved and transferred to the proceeds arising from the sale thereof heretofore made by the receiver herein; and, *second*, that the causes of action in favor of William S. Pollard and Madison J. Bray, administrator of the estate of Cicero Buchanan, are barred by the statute of limitations, and they should take nothing thereby.

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Bray, Admr., *et al.* v. The First Avenue Coal Mining Co. *et al.*

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James D. Parvin, receiver, excepted to the first conclusion of law, and Madison J. Bray, administrator, excepted to the other conclusion. William S. Pollard declined to join in the appeal.

A part of the first conclusion of law seems to be inconsistent with the findings. The court found that the appellee Pittman paid his \$500.00 on the bank indebtedness January 9, 1892, and that the mining company, the principal in that indebtedness, paid him his interest on the sum so paid by him, until November 9, 1895; and yet the conclusion of law is that Pittman ought to recover of the company \$500.00. with interest from January, 9, 1892, thus allowing him double interest for a period of nearly four years. This was perhaps an inadvertence.

The remaining conclusions of law, that the rights of Pollard and Bray to recover are barred by the six years' statute of limitations, do not seem to be in harmony with that part of the first conclusion which holds that the sum due Pittman is secured by the mortgage, and is therefore a lien upon the property sold by the receiver, which lien should be preserved and transferred to the proceeds derived from said sale. It is not clear why the security money paid by one mortgagee should be protected by the mortgage, while the money paid by other mortgagees should go unprotected.

It was to reimburse the sureties in case they were compelled to make such payment that the mortgage security was given them. This security they had a right to rely upon, and we do not think the six years' statute of limitations was any bar to their right to recover. The three solvent sureties who had undertaken the payment of the debt to the bank, stood on an equality. They so recognized one another, and were so recognized by their principal, the mining company,

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Bray, Admr., *et al.* v. The First Avenue Coal Mining Co. *et al.*

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which gave to each of them its note for the amounts paid by them respectively, and paid to each of them, up to the year 1895, interest on the several notes so given, as evidence of the part of the bank debt which each had been compelled to pay.

The claim that the payments so made by the sureties were voluntary, and were made by them to their principal, the mining company, and not to the bank, is quite untenable, as shown by the facts found and by the evidence. The money was paid, not for the use of the mining company, but to be applied upon the bank debt, as was at once done in each case. At the same time renewal notes, signed by all the parties, were given, as were also notes from the mortgagor to each party paying, for the amount then paid by him. All the steps taken in each case were but parts of one transaction. It is idle, then, to say that the money so paid was a loan to the mining company.

But it is said, that the mortgage given being but an indemnifying mortgage, and containing in itself no promise to pay the debt to the bank, or to repay the sums which the sureties should be compelled to pay on such indebtedness, it follows that the payments made must be regarded as, in effect, payments on account, and hence, that, for this reason alone, the six years' statute of limitations must apply, and the case of *Lilly v. Dunn*, 96 Ind. 220, and other like authorities are cited in support of this contention.

Counsel in making this argument seem to overlook the fact, as shown by the findings, that, at the time each payment was made by the sureties, the debtor company gave to each surety its note in evidence of the amount so paid by him. The sums so paid are therefore not payments on account, but payments evidenced by the promissory notes of the mortgagor; which notes, moreover, continued to be acknowledged

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by payment of interest by the mortgagor up to the year 1895. As it was to indemnify against loss on account of payments so made by the sureties that the mortgage was given, and as the payments thus made are evidenced by the promissory notes of the mortgagor, the case is even stronger than if there was a simple promise to pay in the mortgage itself. The sureties hold the notes of the mortgagor as evidence of the debt paid by them, which debt is also secured by the mortgage. As to these notes, the six years' statute of limitations can, of course, have no application. The debt for which the mortgage was a security was, by the agreement of the parties, evidenced from the beginning by these promissory notes of the mortgagor; and being so evidenced, can be subject only to the statutes of limitation applicable to any notes secured by mortgage.

Besides, as we have recently said, in *Simmons Hardware Co. v. Thomas*, 147 Ind. 313, where, as in this case, the mortgage was given to indemnify sureties, and where numerous authorities are cited to the proposition. "A mortgage, strictly speaking, does not secure the note or other evidence of debt, but the debt itself; and no matter what changes may be made in the form of the evidence of indebtedness, the mortgage still remains good as security for the debt itself."

The facts found by the court, amply supported, as we think they are by the evidence, show that the appellee, Charles E. Pittman, should recover the sum of \$500.00, with interest from November 9, 1895, and his costs and attorney's fees, and no more; and that the appellant Madison J. Bray, administrator, should recover the sum of \$500.00, with interest from February 23, 1895, and his costs and attorney's fees. The amounts so due are secured by the mortgage referred to, and are liens upon the property sold by the re-

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ceiver, and these liens ought to be preserved and transferred to the proceeds of said sale in the hands of the receiver.

The judgment is reversed, with instructions to the court to restate its conclusions of law as indicated in this opinion, and to enter judgment accordingly.

DAVIS, SHERIFF, v. CLEMENTS.

[No. 18,208. Filed October 29, 1897.]

**INJUNCTION.—Judgments.—Collateral Attack.**—A proceeding to enjoin the enforcement of a judgment or decree by execution or decretal order is a collateral attack upon the judgment, and cannot be maintained for mere irregularities, but only by showing that the judgment or decree, or the part thereof, the enforcement of which is sought to be enjoined, is void. *p. 607.*

**JUDGMENTS.—Presumptions as to Validity.—Complaint to Enjoin Enforcement Of.**—It will be presumed on appeal that a judgment rendered by a court of general jurisdiction is valid, and a complaint in an action to enjoin the enforcement thereof to be sufficient against a demurrer, must overcome or exclude such presumption. *p. 608.*

**SAME.—Complaint to Enjoin Enforcement Of.—Sufficiency.**—A complaint by the wife of a judgment debtor to enjoin the enforcement of a judgment and decree ordering the foreclosure of a mortgage and the sale of real estate of which her husband was the owner in fee simple, and directing that the proceeds of such sale, after the satisfaction of such mortgage, be applied to the payment of certain judgments, for the reason as alleged in her complaint that she was not made a party to any cross-complaint by any co-defendant in such proceeding, is insufficient where it is not alleged by whom the action in which such decree was rendered was begun, or that such part of the decree assailed was rendered upon a cross-complaint. *pp. 608, 609.*

**PLEADING.—Complaint.—Action to Enjoin Enforcement of Judgment.—Sufficiency.**—A complaint in an action to enjoin the enforcement of a judgment, must allege what the record of the case in which the decree was rendered shows on the subject. *p. 609.*

**SAME.—Facts, not conclusions, should be stated in pleadings.** *p. 610.*

From the Montgomery Circuit Court. *Reversed.*

148	605
150	449
151	207

148	605
155	369
155	504
155	635
156	167

148	605
161	438

148	605
165	289

148	605
170	408

148	605
171	651

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Davis, Sheriff, v. Clements.

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*H. H. Ristine*, for appellant.

*M. M. Bachelder and George Harvey*, for appellee.

MONKS, J.—This action was brought by appellee against appellant, as sheriff of Montgomery county, to enjoin him from paying out money as ordered by a judgment and decree of foreclosure, as shown by a copy of the decree in his hands for execution.

It is alleged in the complaint that "the Ladoga Building, Loan, etc., Association, on December 14, 1895, obtained in the Montgomery Circuit Court against appellee and her husband, a judgment for \$541.11 and costs and a decree of foreclosure for the sale of certain real estate (describing it); that in said decree the appellant as sheriff was ordered to sell said real estate and apply the proceeds of sale as follows: first, to the payment of costs; second, on judgment of the Ladoga Building, etc., Association; third, on judgment of record, held by Daniel J. Davis and Thomas Rankin against Robert Clements; fourth, on judgment of John Maloney against Robert Clements; that Robert Clements is and was at the time of executing mortgage to the Ladoga Building, etc., Association the owner in fee simple of said real estate, and that the appellee was at the time of execution of said mortgage, and ever since has been the wife of said Clements; that she signed said mortgage and is entitled to a one-third interest in said real estate, and is entitled to have said cost and judgment on mortgage paid out of said Clements' two-thirds interest in said real estate, before coming into her one-third interest, and that she is entitled to have one-third of the proceeds of the sale of said land paid to her before any shall be applied on the other judgments against said Clements; that the decree ordering an application of any of the proceeds from said sale upon other judgments



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than the Ladoga Building, etc., Association is not binding upon her one-third interest; that she was not made a party to a cross-complaint by any co-defendant in said foreclosure proceedings; that the appellant has advertised said real estate to be sold on the 25th day of July, 1896, and he will sell the same on that day, and will, unless otherwise ordered by the court, apply the proceeds in the order named in said decree, which would greatly injure her and defraud her of her one-third interest in said real estate; that said real estate is worth \$1,200.00, and she will thereby be defrauded out of \$400.00," etc. Appellant's demurrer to the complaint for want of facts was overruled.

After issues were formed, the cause was tried by the court, and a special finding made and conclusions of law stated thereon in favor of appellee, to each of which conclusions of law appellant excepted.

Before the trial of said cause, appellant sold said real estate on said decree for \$1,200.00, and the court rendered judgment on the special finding, that appellant pay to the clerk of the court, for the benefit of appellee, all the proceeds of said sale remaining after the payment of the cost of said sale and the amount of the judgment and decree in favor of the Ladoga Building, etc., Association, not exceeding, however, \$400.00.

It is settled law that a proceeding to enjoin the enforcement of a judgment or decree by execution or decretal order is a collateral attack upon the judgment, and cannot be maintained for mere errors or irregularities, but only by showing that the judgment or decree, or the part thereof, the enforcement of which is sought to be enjoined, is void. *Shrack v. Covault*, 144 Ind. 260; *Krug v. Davis*, 85 Ind. 309, and cases cited; *Earl v. Matheney*, 60 Ind. 202; *Gum-Elastic Roofing Co. v. Mexico Pub. Co.*, 140 Ind. 158, 30 L. R. A. 700, and cases cited; *Fitch v. Byall* (Ind. App.), 47 N. E. 180.

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The presumption is, that the part of the decree sought to be impeached by appellee, a party thereto, being rendered by a court of general jurisdiction, is valid, and unless the facts stated in the complaint are sufficient to overcome or exclude this presumption, the demurrer thereto should have been sustained. *Exchange Bank v. Ault*, 102 Ind. 322, 327; *Bailey v. Rinker*, 146 Ind. 129, and cases cited; *Cassady v. Miller*, 106 Ind. 69, 71, 72, and cases cited; *Indiana Oolitic Limestone Co. v. Louisville, etc., R. W. Co.*, 107 Ind. 301, 305, and cases cited; *Sims v. Gay*, 109 Ind. 501, 503, and cases cited; *Phillips v. Lewis*, 109 Ind. 62, 68; *Nichols v. State*, 127 Ind. 406, 413.

Appellee contends that co-defendants can have no relief as between themselves, except upon a cross-complaint to which the defendants between whom the relief is sought are made parties, and that under this rule the complaint was sufficient to withstand the demurrer for want of facts. While there are authorities which sustain the rule as stated by appellee, there are cases which hold that adverse interests between co-defendants may be passed upon and a decree made between them, grounded upon the pleadings and proof between the complainant and defendants, and founded upon and connected with the subject matter in litigation between the complainant and one or more of the defendants. See 5 Ency. of Pl. and Prac., pp. 637, 638, where the cases are collected; see, also, *Elliott v. Pell*, 1 Paige Ch. (N. Y.), 263; 2 Dan. Ch. Prac., section 1370, note 6; Story Eq. Pl., section 392, note 3; VanFleet Collateral Attack, sections 749, 750; 1 VanFleet Former Adjudication, p. 573. But if the rule, as stated by appellee, be correct, which we need not and do not decide, the complaint was not sufficient. The part of the complaint which it is claimed brings the case within the rule stated, and shows that appellee

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is not bound by the order to pay the judgment in favor of Davis and Rankin, and the judgment in favor of Maloney is, "that she was not made a party to a cross-complaint by any co-defendant in said foreclosure proceedings." It is not alleged in the complaint that the Ladoga Building, etc., Association commenced the action in which the decree was rendered, so far as the facts alleged show, the other parties to said decree, Davis and Rankin, or Maloney, may have commenced the same by complaint against the Ladoga Building, etc., Association, appellee, and others as defendants, and such association may have obtained its judgment and decree on a cross-complaint. It is not shown by the complaint that the part of the decree assailed was rendered upon a cross-complaint. For all that appears from the complaint, it may have been rendered upon the complaint to which appellee was a party. Even if it were alleged that the Ladoga Building, etc., Association commenced the action, making appellees, Rankin and Davis and Maloney defendants thereto, it would not be sufficient, upon appellee's theory of the case, even if correct, to aver that she was not made a party to any cross-complaint. To properly present the question the complaint must allege what the record of the case in which the decree was rendered shows on the subject. *Phillips v. Lewis, supra*; *Krug v. Davis, supra*; *Cassady v. Miller, supra*; *Bailey v. Rinker, supra*.

The allegation "that she is entitled to have one-third of the proceeds of the sale of said land paid to her before any shall be applied on other judgments against Robert Clements," states only a legal conclusion. The facts concerning said judgments, and date when rendered, and whether specific or only general liens, should be stated. Facts, not conclusions, should

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be stated in pleadings. *Caskey v. City of Greensburg*, 78 Ind. 233, 237, and cases cited; *Krug v. Davis*, *supra*, and cases cited; *State, ex rel., v. Casteel*, 110 Ind. 174, 187; *Lawrence v. Beecher*, 116 Ind. 312, 316; *Western Union Tel. Co. v. Taggart*, 141 Ind. 281, 283.

The conclusions of law stated by the court in favor of appellee are erroneous for the same reasons which render the complaint insufficient.

Judgment reversed, with instructions to sustain the demurrer to the complaint, and for further proceedings not inconsistent with this opinion.

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THE STATE v. BATES ET AL.

[No. 18,268. Filed November 2, 1897.]

**CRIMINAL LAW.—Use of Stenographer Before Grand Jury.—When Will Not Abate an Indictment.**—The presence of a stenographer in the grand jury room, at the request of the prosecuting attorney, and the taking down in shorthand for the use of the prosecution, the evidence upon which an indictment was returned, is not sufficient to abate the indictment, without some showing that the accused was injuriously affected thereby.

From the Sullivan Circuit Court. *Reversed.*

*W. A. Ketcham*, Attorney-General, *Merrill Moores*, *C. D. Hunt* and *W. H. Bridwell*, for State.

*Buff & Nesbit*, *A. D. Leach* and *John S. Bays*, for appellees.

**MONKS, J.**—Appellees were charged by indictment with the crime of murder in the first degree. To the indictment they filed a plea in abatement. Appellant's demurrer to said plea was overruled, and appellant refusing to plead further, the court rendered judgment that said action abate, etc. The only error

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assigned calls in question the action of the court in overruling the demurrer to said plea in abatement.

It is alleged in the plea in abatement, in substance, that one Helen L. Hinkle, a stenographer, was present in the grand jury room at the request of the prosecuting attorney, and took down in shorthand all the evidence given before the grand jury upon which the indictment was returned in this case. And that she afterwards wrote out said evidence in longhand for the use of such persons as were employed to prosecute said appellees upon said indictment; that said stenographer was not called before said grand jury as a witness, but was there for the sole purpose of taking said evidence in shorthand, that the same might be copied and used in the prosecution of said cause.

The right to take down the evidence given before the grand jury and preserve the same for use in the prosecution of those charged with crime is expressly given by statute. It is provided in section 1724, Burns' R. S. 1894 (1655, R. S. 1881), that "the grand jury must select one of their number as clerk, who must take minutes of their proceedings (except the votes of the individual members on a presentment or indictment), and also of the evidence given before them; which shall be preserved for the use of the prosecuting attorney, to subserve the purposes of justice." If the clerk so selected was a stenographer, he could take all of such proceedings and evidence in shorthand, and write the same out in longhand for the use of the prosecuting attorney, as provided in said section; and the prosecuting attorney or his deputy, who are authorized by section 1737, Burns' R. S. 1894 (1668, R. S. 1881), to appear before the grand jury to interrogate witnesses, and give information and advice, concerning matters cognizable by it, clearly have the right to take such evidence, either in shorthand or otherwise, for the use of the State in the prosecution of such cases.

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The mere taking down in shorthand of evidence given before the grand jury is not in violation of law, but is in conformity therewith. It is true, there is no statute expressly authorizing a person not a member of the grand jury to remain in the grand jury room and take evidence in shorthand or otherwise for the use of the prosecution, neither is there any statute expressly prohibiting it. A person so attending before the grand jury and taking the evidence at the request of the prosecuting attorney is his assistant, and the federal courts, where there is no statute either authorizing or prohibiting the taking of evidence by such persons, have held that the attendance of a stenographer before the grand jury for the purpose of taking the evidence for the use of the district attorney in the discharge of his official duties, was not irregular or illegal. *United States v. Simmons*, 46 Fed. 65.

It is clear, that the mere taking in shorthand of the evidence given before the grand jury furnishes no ground for abating the indictment.

Does the fact that such evidence was taken by one not a member of the grand jury, or a prosecuting attorney, furnish such ground?

It is the rule that the presence of a stranger in the grand jury room during the investigation of a criminal charge, is not sufficient to abate an indictment, unless it appears that the person indicted was thereby injured in his substantial rights. *Shattuck v. State*, 11 Ind. 473; *Courtney v. State*, 5 Ind. App. 356; *State v. Clough*, 49 Me. 573, 576; *State v. Kimball*, 29 Iowa 267; *Bennett v. State*, 62 Ark. 516, 535, 36 S. W. 947.

In *State v. Clough*, *supra*, on page 576, the court said: "The mere fact that a stranger was present when an indictment was found, would not render it void. Though obviously proper, and highly important, that the proceedings of a grand jury should be in secret,

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one who is indicted cannot take any advantage of it if they are not. *Shattuck v. State*, 11 Ind. 473. The secrecy is not required for his benefit,—but otherwise. ‘One reason may be to prevent the escape of the party, should he know that proceedings were in train against him; and another may be, to secure freedom of deliberation and opinion among the grand jurors, which would be impaired if the part taken by each might be known to the accused.’ 1 Greenl. Ev., section 252.” Nor will any indictment be set aside on the ground of informalities or irregularities, when it is not shown that the defendant has been prejudiced in his substantial rights. *Shattuck v. State*, *supra*; *Commonwealth v. Bradney*, 126 Pa. St. 205, 17 Atl. 600; *United States v. Reed*, 2 Blatchf. 435, 27 Fed. Cas. 727; *United States v. Terry*, 39 Fed. 355, 360, 361; *United States v. Simmons*, *supra*; *State v. Justus*, 11 Ore. 178, 8 Pac. 337; *State v. Fertig* (Ia.), 67 N. W. 87; *State v. Kimball*, *supra*; *State v. Miller*, 95 Ia. 368, 64 N. W. 288; *Bennett v. State*, *supra*; *State v. Clough*, *supra*; *State v. Baker*, 33 W. Va. 319, 322, 10 S. E. 639; Thornton on Juries, section 517; Thompson and Merriam on Juries, sections 631, 632.

In *State v. Miller*, *supra*, it was complained that the clerk of the grand jury, who (as required by the statute of Iowa) was not a member of the grand jury, asked the witnesses certain questions at the request of the foreman, the clerk being a practicing attorney. the court said: “The only serious question presented in regard to him was whether he so far violated the law in participating in the examination of witnesses as to give cause for setting aside the indictment. The statute under which he acted provided that he should ‘take no part in the proceedings aside from his clerical duties,’ and that he should ‘strictly abstain from expressing any opinion upon any question before the

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grand jury, either to the jury, or to any member thereof.' Section 4275 of the Code, as amended. It appears that the clerk in this case asked the witnesses some questions, but they were asked at the request of the foreman, and were followed by questions asked by different members of the grand jury. Such a practice is not to be commended, but the district court necessarily found that what was done in this case was not prejudicial to the defendant, and we think the conclusion is fully justified by the record."

In *State v. Justus, supra*, under a statute providing "that no person other than the district attorney can be allowed to be present during the sittings of the grand jury," it was complained that a person not authorized by law was present before the grand jury at the request of the district attorney, for the purpose of assisting in the examination of witnesses and in framing the indictment. The court, at p. 181, said: "At most, it was but an irregularity, but of that character which does not bring into question the qualifications of the grand jurors or their fairness toward the accused. Nor is it claimed that any injustice or wrong was done the person by reason of this alleged error at the trial. Upon authority it is clear the objection can not prevail."

The same question as presented in this case came before the Appellate Court of this State in *Courtney v. State, supra*, where it was, as we think, correctly held that the use of a stenographer by the prosecuting attorney under such circumstances, was not sufficient to abate the indictment without some showing that the accused was injuriously affected, and that the presence of a stenographer before a grand jury was not necessarily inconsistent with the due administration of justice in criminal cases.

It does not appear from the plea in abatement that



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the shorthand reporter said or did anything in the presence of the grand jury that influenced their action in returning the indictment against appellees, nor is there any allegation of fraud or improper motives on the part of either the prosecuting attorney or the shorthand reporter. On the contrary, so far as shown by the allegations of the plea in abatement, they seem to have acted in perfect good faith, and in the interest of the public.

It follows that the court erred in overruling the demurrer to the plea in abatement.

Judgment reversed, with instructions to sustain appellant's demurrer to the plea in abatement, and for further proceedings not inconsistent with this opinion.

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**JAMES v. THE LAKE ERIE AND WESTERN RAILWAY COMPANY.**

148	615
152	589

[No. 18,069. Filed November 8, 1897.]

**APPEAL.**—*Decision of Appellate Court.*—*Law of Case.*—A decision of the Appellate Court constitutes the law of the case on a subsequent appeal to the Supreme Court involving the same questions.

From the Madison Circuit Court. *Affirmed.*

*D. W. Wood* and *W. S. Ellis*, for appellant.

*W. E. Hackedorn*, *J. B. Cockrum*, *M. A. Chipman*, *S. M. Keltner* and *E. E. Hendee*, for appellee.

**HACKNEY, J.**—This was an action by the appellant for damages for the refusal of the appellee to transport over its railway from New Castle, in Henry county, to Cambridge City, in Wayne county, the remains of his deceased wife.

The action as originally instituted was upon a com-

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plaint for \$1,000.00 as damages, and, upon a trial, resulting in a judgment in favor of this appellant for \$400.00, was appealed to the Appellate Court, 10 Ind. App. 550, where the complaint was held to be insufficient to state a cause of action, in that it disclosed that no proper transit permit was obtained from the health officer at the point from which said remains had been shipped, to-wit: Anderson, Indiana; that the pretended permit, held by the appellant, failed to disclose the name of the physician attending upon the deceased at the time of her death, as required by rule five, of the State Board of Health, adopted pursuant to the authority of acts 1891, section 5. Acts 1891, p. 16.

Upon the reversal of the judgment, as aforesaid, the complaint was amended so as to state differently the excuse offered by the railway agent for not accepting said remains for transportation, and in other unimportant respects, including an increase in the amount of damages demanded. To the amended complaint the lower court sustained appellee's demurrer, and that ruling is assigned as the only error for review.

It is not claimed, nor is there reason to claim, that the cause of action, now pleaded, differs from that pleaded in the original complaint, or that it is alleged with any substantial difference. The only questions now discussed are those passed upon in the former appeal, and they all relate to the requirement of the State Board of Health that a transit permit shall state the name of the attending physician. Not only as an authority or precedent, but as establishing the law of the case, do we accept the decision of the Appellate Court upon the former appeal.

In the recent case of *Board, etc., v. Bonebrake*, 146 Ind. 311, we had occasion to collect the numerous decisions in this State upon the law of the case, and, without variation, they hold that the judgment upon

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appeal rules the case throughout all of its subsequent stages upon the questions decided.

In *Lillie v. Trentman*, 130 Ind. 16, it was said that "The principles of law established on the former appeal, so far as applicable, remain the law of this case through all of its subsequent stages, and must be adhered to, whether right or wrong, not only in the trial court, but in this court, on a second, or any subsequent appeal." And further, "Where the sufficiency of a pleading has been passed upon by this court, that ruling will be adhered to on a second appeal, unless the same has been amended so as to materially change its character."

In 2 Van Fleet's Former Adj., p. 1302, it is said: "If a cause is reversed in a higher court, the lower one is bound to proceed in accordance with the opinion sent down. The parties are compelled to retry the case on the new rules laid down, and to shape their respective causes of action or defense accordingly. Having done so, and in many cases having irretrievably changed their positions, it would work injustice to overturn these rules on a second appeal, and these again on a third, and so on, *ad infinitum*. The suit might never end. Besides, it would be very undignified, and tend to bring the courts into merited disrespect, if the lower court should be compelled to retrace its steps on one appeal, and then to trace them back again on a second, and so on. Hence, with a few exceptions, it is a rule that a matter decided on appeal becomes, in effect, *res adjudicata* in that cause; or, as it is frequently expressed, it becomes the 'law of the case' in all its subsequent proceedings."

The lower court, in this cause, followed the law of the case as declared by the Appellate Court, a court of last resort, whose opinion in this case requires the respect and obedience, both of the trial court and of

this court. The fact that the appellant so increased his demand that an appeal would lie to this court, instead of the Appellate Court, would have been no justification for the trial court to depart from the rule laid down by the Appellate Court, and to overrule the appellee's demurrer.

That the case, upon the ruling of the trial court, made in obedience to the rule and command of the Appellate Court, comes to this court upon the present appeal does not change the law of the case and render that obedience erroneous. If it did, and we should reverse the case the appellant might again amend his demand by reducing it to a sum within the jurisdiction of the Appellate Court, and thus play the see-saw between the courts of last resort indefinitely.

One decision of a question in any case, by a court of final resort, should be conclusive, and a litigant should not be permitted by immaterial amendments to obtain two decisions by courts of last resort upon one and the same question.

We hold, therefore, that under the law of the case, as established upon the appeal to the Appellate Court, the appellant is precluded.

The judgment is affirmed.

# WINSTANDLEY ET AL. v. BREYFOGLE, TRUSTEE, ET AL.

[No. 18,115. Filed November 8, 1897.]

148	618
159	248
148	618
164	139

**APPEAL AND ERROR.**—*Bill of Exceptions.*—*Longhand Manuscript of Evidence.*—The record must affirmatively show that the longhand manuscript of the evidence was filed in the clerk's office before it was incorporated in the bill of exceptions. p. 619, 620.

**SAME.**—*Special Finding.*—A special finding must be identified by the signature of the trial judge, or must be made part of the record by bill of exceptions or order of court. p. 620.

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Winstandley *et al.* v. Breyfogle, Trustee, *et al.*

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SAME.—*Exceptions to Conclusions of Law.*—An exception to conclusions of law, to be available, must be taken before any other steps are taken in the case. p. 620.

SAME.—*Bill of Exceptions.*—*Clerk's Certificate.*—The clerk's certificate of authentication should not be found in a bill of exceptions, but should, itself, authenticate such bill, as well as the pleadings and entries of the case. p. 621.

From the Monroe Circuit Court. *Affirmed.*

G. O. Iseminger, R. G. Miller and J. R. East, for appellants.

F. M. Trissal and Hatch & Ritsher, for appellees.

HOWARD, J.—This seems to have been an action by appellants against appellee to set aside as fraudulent certain sales of real estate and personal property, and to subject such property to the payment of debts mentioned in the complaint.

The appellants have furnished us with a meager and unsatisfactory brief of three typewritten pages. The only action of the court concerning which there is any discussion in this brief is as to the conclusions of law. In contending that these conclusions were erroneous, counsel refer us to the special findings of the court, saying: "See bill of exceptions, between pages 29 and 30, special findings." Turning to what appears in the transcript as a bill of exceptions we do not discover anything between pages 29 and 30; neither have we been able to meet with any special findings anywhere in the so-called bill of exceptions.

This bill of exceptions is without marginal notes. Besides, from the judge's certificate, it appears that on January 24, 1896, when the bill was presented to him, it contained the longhand manuscript of the evidence. The clerk's certificate shows that this manuscript of the evidence was not filed in his office until

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Winstandley *et al.* v. Breyfogle, Trustee, *et al.*

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January 28, 1896, at which time the bill of exceptions was also filed. It is evident, therefore, that the bill of exceptions is not in the record, and it is immaterial whether it may contain the special findings of the court or not, even if such findings could be made a part of the record by such a bill of exceptions.

In the first part of the written transcript we do find six typewritten pages inserted, which are in the form of special findings of fact; but these findings are not signed by the judge, neither are they followed by any conclusions of law. The transcript shows that three days afterwards, and after acting upon a motion for a *venire de novo* and upon a motion for a new trial, the court made "its conclusions of law upon the special findings of facts filed the present term." Whether these conclusions were upon the facts to which we have referred we do not know. It is not shown that the conclusions of law were filed with such facts, or that they were filed at all.

A special finding, as held in *Ferris v. Udell*, 139 Ind. 579, must be identified by the signature of the judge, or must be made a part of the record by bill of exceptions or order of court. The judge is to state both the facts and the conclusions of law in writing, the conclusions immediately following and in connection with the facts; and his signature after the conclusions will be sufficient. The exception to the conclusions of law, to be available, should, in general, immediately follow such conclusions. It should at least be taken by the party before he takes any other steps in the case. The utmost latitude, as suggested in *Elliott's App. Proc.*, section 793, is that, "The exception is shown to be timely if it appears in the same entry as that in which the special finding is contained." See, also, *Roberts v. Smith*, 34 Ind. 550; *Service v. Gambrel*, 110 Ind. 349; *Branch v. Faust*, 115 Ind. 464.

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But it can hardly be said that any part of the transcript before us is authenticated as a part of the record. The only certificate of the clerk as to the correctness of the transcript of the pleadings and record entries is found in and as a part of the so-called bill of exceptions. The clerk's certificate of authentication should not be found in the bill of exceptions, but should itself authenticate such bill, as well as all the pleadings and record entries of the case. We have seldom met with so unsuccessful an effort to bring up a record to this court. No question being presented, the judgment is affirmed.

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THE STATE v. FEAGANS.

[No. 17,874. Filed November 4, 1897.]

148	621
169	246
169	559

CRIMINAL LAW.—*Officer Interested in Public Contract.—Indictment.—Statute Construed.*—An indictment under section 2136, Burns' R. S. 1894, which charges that defendant, while councilman, became interested as joint subcontractor, in the improvement of certain streets in such city without showing that the street improvement had been let to any person, or that defendant entered into or became interested in any manner, in any contract with the city, is not applicable to such statute, and fails to charge a public offense. pp. 621-624.

SAME.—*Indictment.*—An indictment must state by direct averments facts constituting the offense as defined by statute, and such a degree of certainty must be shown by its averments as to fully inform the accused of the charge preferred, and the court and jury of the crime of which, upon the trial, he is to be convicted or acquitted. pp. 624, 625.

From the Daviess Circuit Court. *Affirmed.*

W. A. Ketcham, Attorney-General, Merrill Moores and P. R. Wadsworth, for State.

JORDAN, J.—The indictment in this appeal is based on section 2136, Burns' R. S. 1894, which forbids cer-

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*The State v. Feagans.*

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tain officers therein mentioned from becoming interested in public contracts, under the penalty of a fine and imprisonment in the State's prison. The charging part of the indictment is as follows: "that Richard Feagans, on the 25th day of July, A. D., 1894. at and in the county of Daviess and State of Indiana, was then and there a duly elected, qualified, and acting councilman for the city of Washington in said county and State, did then and there while being such councilman unlawfully and feloniously become interested in the construction of certain parts of the improvement of certain public streets of said city of Washington, to-wit: in the excavating and curbing of Main street between East Second and East Fifth streets and East Second, East Third and East Fourth streets between South and Van Tres streets, which streets were being then and there improved for the use of said city, by then and there unlawfully and feloniously being connected with Peter Reister as joint subcontractors in the excavating and curbing of said streets, contrary," etc.

On motion of the appellee the court quashed the indictment, and from this decision the State has appealed.

We are not favored with a brief upon the part of appellee, and are not advised of the cause for which the trial court held the pleading insufficient.

The part of the section said to be applicable to this prosecution may be read as follows: "Any state officer, county commissioner, township or town trustee, mayor or a common councilman of any city, school trustee of any town or city, or their appointees or agents, or any person holding any appointing power, or any person holding a lucrative office under the constitution or laws of this State, who shall, during the time he may occupy such office or hold such appoint-



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ing power and discharge the duties thereof, be interested, directly or indirectly, in any contract for the construction of any state-house, court-house, school-house, bridge, public building, or work of any kind erected or built for the use of the State, or any county, township, town, or city in the State, in which he exercises any official jurisdiction," etc.

It will be perceived that this statute, among other things, declares it to be a penal offense for a common councilman of a city, during the time he may occupy such office and discharge the duties thereof, to be interested, directly or indirectly, in any contract for the construction of any school-house, bridge, public building or work of any kind, for the use of the city in which he exercises his official jurisdiction. It is evident, we think, that the indictment in this case is not applicable to the provisions of this statute, and does not charge a public offense as is defined by its terms. It proceeds entirely upon the theory that the offense is sufficiently charged by alleging that the defendant, while councilman, became interested in the improvement of the streets by being connected with Reister as a joint subcontractor. There is no charge that appellee entered into or became interested in any manner in any contract with the city for the improvement of the streets. There is no averment showing that the street improvement had been let to any person by a previous contract, under which Reister and the appellee became subcontractors, for doing the work of excavating and curbing.

In *Case v. Johnson*, 91 Ind. 477, which was an action to enjoin the appellees from improving a street of the town of Fowler under an alleged contract between them and the board of trustees of said town, the appellants, Case and Jones, were town officers; the former being town assessor, and the latter a member of the

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*The State v. Feagans.*

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board of trustees. This court, on page 490 of the opinion, in referring to this statute as originally enacted in 1872, said: "The appellant Jones, as town trustee, and the appellant Case, as assessor of the town, were positively prohibited from becoming interested, directly or indirectly, in any contract for the improvement of Fifth street in the town of Fowler during the time they held their respective offices, under the penalty of being 'deemed guilty of a felony,' and suffering the punishment prescribed in the statute. And in section 4 of such act, it was expressly declared that all contracts and agreements, made in violation of the act, should be void. The appellants' contracts for the improvement of Fifth street, therefore, were illegal and void; and upon this ground there was no error in the court's conclusions of law."

We are informed by the brief of the State's attorney that the city of Washington entered into a contract with one Jacob Eichel to improve the streets mentioned in the indictment, that the latter subsequently let, by a subcontract, the excavating and curbing to Reister and the appellee. No such facts are alleged in the indictment, but it is left to be inferred that the street improvement was being made in pursuance of a contract with the city. The offense created by the statute consists, as we have seen, of the officer becoming interested in a contract of the city for the construction of the public work mentioned, and not merely in being interested in the construction of such work. Certainly before he can be interested in such a contract it must be shown to have existed. See *Moores and Elliott's Crim. Law*, section 1085, p. 573.

The rule is well settled that the indictment must state by direct averments facts constituting the offense as defined by the statute, and such a degree of certainty must be shown by its averments as to fully

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inform the accused of the charge preferred, and the court and jury of the crime of which, upon the trial, he is to be either convicted or acquitted. *State v. Record*, 56 Ind. 107; Gillett Crim. Law, section 125; *McLaughlin v. State*, 45 Ind. 338.

At least, for the reasons mentioned, the pleading is fatally defective, and was properly quashed.

Judgment affirmed.

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HAGGERTY v. WAGNER.

[No. 17,918. Filed November 4, 1897.]

**PARTITION.**—*Wife of Co-Tenant Not a Necessary Party.*—In a partition suit between co-tenants a wife of one of the co-tenants is not a necessary party; and in the event of a partition sale of real estate in a proceeding wherein such wife was not made a party, she is bound by such proceedings and sale, though she outlives her husband and becomes his surviving widow; for the inchoate right of the wife to one-third of her husband's land, subsists by virtue of the seizin of the husband, and is always subject to any incumbrance, infirmity, or incident which the law attaches to the seizin either at the time of the marriage or at the time the husband becomes seized; and a liability to be divested by a partition sale is an incident which the law affixes to all estates of co-tenancy.

148	625
156	819
148	625
168	133
168	134
168	135

From the Marion Superior Court. *Reversed.*

*Ayres & Jones and Caroline B. Hendricks*, for appellant.

*T. E. Johnson*, for appellee.

**MCCABE, C. J.**—Appellee sued the appellant in the Superior Court for partition of lots 16 and 17 in Han-naman's south addition to the city of Indianapolis and to quiet her title to her alleged proportion thereof. The action was commenced May 3, 1894.

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The issues formed were submitted to, and tried by the court, resulting in a special finding of facts, upon which the court stated conclusions of law favorable to the plaintiff. Judgment was rendered pursuant to the conclusions of law, in favor of the appellee.

The conclusions of law are assigned for error.

The material facts found are, in substance, that appellee, Mary J. Wagner, and said Peter Wagner were married on November 22, 1855, in Clay county, Indiana, where they lived together as husband and wife until May 11, 1887, when said Peter died intestate, leaving an estate of less than \$5,000.00, and left surviving him said Mary J., as his widow, together with five children.

At and prior to May 16, 1856, said Peter Wagner, the husband of appellee, was the owner in fee simple of an undivided interest in a tract of land of about six acres situated in Marion county, Indiana, out of which the lots in dispute have been carved. At said date, he and some ten other persons held the aforesaid tract, undivided, as tenants in common. On said May 16, 1856, proceedings for partition were instituted by said Peter Wagner, and others of his co-tenants, against their co-tenant, George Wagner, in the common pleas court of said county. At the trial of that cause the land sought to be partitioned was found not to be susceptible of division, and the same was by the court ordered to be sold as an entirety, and David S. Beaty was appointed a commissioner to make the sale thereof; and, in pursuance of such order, he sold said real estate to William Smith and executed to him a commissioner's deed for the same, which deed was approved by the court and duly recorded, and the proceeds arising from the sale were paid to and divided among the parties to the action according to their respective shares and rights. The appellee, the wife of said

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Peter at the time said former action for partition was commenced, was not in any manner made a party plaintiff or defendant to said action, nor did she join in any manner therein, neither was she notified of the pendency thereof, and had no knowledge of said partition proceedings until after the death of her said husband. She never joined her husband at any time in the conveyance of any part of said real estate, nor in any manner or form did she dispose of her inchoate interest therein by her own act. Through *mesne* conveyances from said Smith and his grantees, appellant, Patrick Haggerty, was seized by deed of conveyance of said lots 16 and 17.

The conclusions of law are to the effect that appellee, Mary J. Wagner, is the owner of a moiety of the undivided one-third of her deceased husband's interest in said real estate, and that appellant, Patrick Haggerty, is the owner of the residue thereof.

The ground upon which the conclusion that appellee, Mary J. Wagner, is the owner of a moiety of the real estate in question is based, as we learn from appellee's brief and a written opinion filed by the learned judge of the trial court, is, that by failure to make her a party to the prior partition proceedings, her inchoate interest in said lands as the wife of Peter Wagner, was not extinguished by the partition sale. The question thus raised is a new one in this court, the same never having been directly decided before, nor has the question ever previously been before or considered by this court.

The question has been considered and decided by other courts of last resort under statutes somewhat similar to our own. Some of those courts have decided the question one way, and some the other. We therefore feel called upon to consider the question upon principle before reviewing the decisions.

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The question primarily is this: Is it necessary in a partition suit between co-tenants, where one of the co-tenants has a wife living at the time the partition proceedings are had, to make such wife a party thereto in order to make such proceedings binding on her in case she outlives her husband and becomes his surviving widow? The discussion has taken a wide range, involving a consideration of various statutes.

Great stress is laid upon section 2652, Burns' R. S. 1894 (2491, R. S. 1881), which was in force at the time the prior partition proceedings took place. It provides, among other things, that "A surviving wife is entitled, except as in section seventeen [section 2483] excepted, to one-third of all real estate of which her husband may have been seized in fee simple at any time during the marriage, and in the conveyance of which she may not have joined, in due form of law." The only exception in section 17 is in favor of creditors where the real estate exceeds in value \$10,000.00, in which case the widow as against such creditors only takes one-fourth, instead of a third, and where such real estate exceeds in value \$20,000.00 she takes as against such creditors one-fifth, instead of a third. These exceptions have no application to the facts in this case, and hence no bearing.

The sweeping language that she is entitled to one-third of all real estate of which her husband may have been seized in fee simple at any time during the marriage, and in the conveyance of which she may not have joined in due form of law, is subject to exceptions not mentioned in the statute of descents, which arise out of other laws and the evident intent of the legislature. For instance, it has no force where the husband's title was divested before the section took effect. *Taylor v. Sample*, 51 Ind. 423. And where liens existed on the lands at the time the marriage took

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place, such liens may be enforced so as to extinguish her inchoate interest in the land, even though she do not join with her husband in any form of conveyance of the land. *Armstrong v. McLaughlin*, 49 Ind. 370; *Eiceman v. Finch*, 79 Ind. 511. And the same is true where the lien existed at the time the husband became seized of the land. *Kissel v. Eaton*, 64 Ind. 248; *Godfrey v. Craycraft*, 81 Ind. 476; *Vandevender v. Moore*, 146 Ind. 44.

And so it has been held by this court, and correctly, we think, that where land was conveyed by its owner to another, so that the other could mortgage it to the school fund to secure a loan for the benefit of the grantor, and then such grantee conveyed the land back to the grantor, without the wife of such first grantee joining in the conveyance, and afterwards he died, leaving his wife surviving him, she was not entitled under this section to any part of such land, though she came within the very letter of the statute; because, in analogy to the common law inchoate right of dower, the seizin of the husband was only instantaneous, and hence insufficient to create the inchoate right. *Johnson v. Plume*, 77 Ind. 166.

Again, where real estate is appropriated upon compensation in the exercise of the power of eminent domain, or in case of the dedication of lands of the husband to public use in making highways, canals, railroads, streets and the like, the inchoate right of dower, or its substitute, the inchoate right of the wife to one-third in fee simple in her husband's lands, is extinguished without her joining in any deed therefor, or being made a party thereto in any manner or form. *Duncan v. City of Terre Haute*, 85 Ind. 104; *City of Indianapolis v. Kingsbury*, 101 Ind. 200.

In the first one of the two cases last cited above, it is said, on pages 106 and 107, that: "The courts of this

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country seem to have uniformly held, when the question has come before them, that when lands are appropriated by the exercise of eminent domain, or what is said to be equivalent to it, the dedication of lands to public use, the dower of the wife is defeated. *Guynne v. City of Cincinnati*, 3 Ohio 24, 17 Am. Dec. 576; *Moore v. Mayor, etc.*, affirmed in the court of appeals, 8 N. Y. 110; *Jackson v. Edwards*, 7 Paige 386; 1 Scribner, Dower, pp. 550 to 555. Dillon in his treatise on Municipal Corporations (2d ed.), section 459, says: 'As dower is not the result of contract, but is a positive legislative institution, it is constitutionally competent for the legislature to authorize lands to be taken by a municipal corporation for a market, street, or other public use, upon an appraisement and payment of their value to the husband, the holder of the fee, and such taking and payment will confer an absolute title divested of any inchoate right of dower. Nor is a widow dowable in lands, dedicated by her husband in his lifetime to the public, where the dedication is complete or has been accepted and acted upon by the municipal authorities.'

"Washburn, in treating of the various modes in which dower may be defeated, says: 'One mode in which dower may be defeated remains to be mentioned, and that is, by the exercise of eminent domain during the life of the husband, or, what is equivalent to it, the dedication of land to the public use.' 1 Washb. Real Prop. (4th ed.), p. 269.

"In *Moore v. City of New York*, 4 Sandf. 456, the court, in speaking of a former decision says: 'We then held that the wife's right of dower was merely inchoate during the life of the husband, and that she had no vested or certain interest in his lands. The right being merely an incident to the marriage relation, it seems to us that while this right is thus inchoate, and



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before it has become vested by the death of the husband, any regulation of it may be made by the legislature, though its operation is in effect to divest the right; the marriage relation itself being within the power of the legislature to modify, or even abolish it.' ”

These several exceptions to the full force and effect of the section of our statute of descents quoted above, manifestly arise out of other statutes and laws creating rights in other persons paramount to the inchoate right of the wife in the lands of her husband.

Dower having been abolished by the revision of 1852, it has often been said by this court that the provision made for the widow in her husband's real estate by the same revision was a substitute for dower, and many of the rules that had been previously applied to dower have since been applied to the substitute. Two provisions in favor of the widow, in lieu of, or as a substitute for dower in her husband's real estate, have been made by the revision of 1852, and since re-enacted and now in force. One of them is the section already quoted, and the other is the old section 17 of our statute of descents. Section 2640, Burns' R. S. 1894 (2483, R. S. 1881). This section provides that “If a husband die testate or intestate, leaving a widow, one-third of his real estate shall descend to her in fee simple,” etc. The widow takes under this section as heir of her husband. *Rusing v. Rusing*, 25 Ind. 63; *May v. Fletcher*, 40 Ind. 575; *Bowen v. Preston*, 48 Ind. 367; *Brown v. Harmon*, 73 Ind. 412; *Derry v. Derry*, 74 Ind. 560; *Hendrix v. McBeth*, 87 Ind. 287. But the widow does not take under section 27, old number, section 2652, Burns' R. S. 1894 (2491, R. S. 1881), first above quoted, as heir, but by virtue of her marital rights. *Bowen v. Preston*, *supra*; *Brannon v.*

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*May*, 42 Ind. 92; *Johnson v. Miller*, 47 Ind. 376; *Hendrix v. McBeth*, *supra*; *McKinney v. Smith*, 106 Ind. 404. And, therefore, the interest the widow takes under said section is more like dower than the interest which she takes under the other section, where it provides that one-third of her husband's real estate shall descend to her. This provision impliedly requires that her husband shall die seized of the real estate mentioned therein, because it could not descend from him to her if he did not die seized of it. The other section, and the one here involved, only requires it to be real estate of which her husband may have been seized in fee simple at any time during the marriage and in the conveyance of which she may not have joined in due form of law. That was the precise quality of dower at common law, except that it was a life estate in one-third of all lands "as were her husband's at any time during the coverture." 1 Greenleaf's *Cruise on Real Prop.*, star p. 165.

In *Johnson v. Plume*, 77 Ind. 166, being a case where the surviving widow was asserting her right to land once owned by her husband and in the conveyance of which she had not joined him, founding her claim on the same section relied on by the appellee here, this court, after quoting the section, said: "By the terms of this statute a surviving wife is entitled to one-third of all the real estate of which the husband was seized at any time during the marriage, and in the conveyance of which she did not join. The appellee's husband was seized of the land in dispute, and as she did not join him in the conveyance made to James Galately, she is within the letter of the statute; and, if the statute is to be literally construed, her claim must prevail. At the common law a widow was entitled to dower in all lands of which her husband was seized at any time during coverture, and in the conveyance of

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which she did not join. This was the law in this State before the present statute was enacted. Since its enactment she is entitled to a third in fee. The statute merely enlarges her rights, by substituting a third in fee for a dower interest, but does not otherwise change them; therefore, she cannot claim a third in fee in any lands in which she could not have claimed dower before the adoption of the statute. At the common law she could not claim dower in lands held by her husband, as trustee, nor in such as he held by instantaneous seizin. These rules apply under the statute, and, if the appellee's husband's seizin was instantaneous, or that of a trustee, she cannot recover." As before observed, it was held that the seizin of the husband was for a particular purpose, and therefore a mere instantaneous seizin, and hence she could not recover.

No reason has been suggested, nor can we think of any, why the inchoate right of the wife of a co-tenant of real estate may not be extinguished by a partition sale without making her a party, as well as in cases where the husband's title is divested before the section took effect, in cases where liens existed on the land at the time the marriage took place, in cases where liens on the land existed at the time the husband became seized, in cases where his seizin was only for a temporary purpose, and in cases where the husband's land is appropriated upon compensation in the exercise of the power of eminent domain, or in cases of the dedication of lands of the husband to public use in making highways, canals, railroads, streets, market places, cemeteries and the like.

But it is earnestly and ably contended by appellee's learned counsel that another section, 2660, Burns' R. S. 1894 (2499, R. S. 1881), imperatively requires the wife to be made a party in such a case, or the proceed-

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ings will be void as to her. That section was in force when the prior partition proceedings took place, and it reads as follows: "No act or conveyance, performed or executed by the husband without the assent of his wife, evidenced by her acknowledgment thereof in the manner required by law; nor any sale, disposition, transfer, or incumbrance of the husband's property, by virtue of any decree, execution or mortgage to which she shall not be party (except as provided otherwise in this act), shall prejudice or extinguish the right of the wife to her third of his lands or to her jointure, or preclude her from the recovery thereof, if otherwise entitled thereto." It is not claimed, as it could not reasonably be, that the first clause of the section is applicable to the case.

But the last clause is relied on with great confidence by the appellee. It is earnestly insisted that the latter clause expressly provides that no decree to which she shall not be a party "shall prejudice or extinguish the right of the wife to her third in his (her husband's) lands." Plain and imperative as this language is, it must receive a construction. Because, as we have already seen, this court has held in the various cases above mentioned that the wife's inchoate interest in her husband's land may be extinguished by proceedings to which she was not a party; and this, too, while the section just quoted was in full force. This section must be construed along with a section of the code of civil procedure hereinafter referred to, and relied on by appellee as establishing the law as to necessary parties in partition proceedings.

The reason why the two sections must be construed together is that they relate to the same subject, namely: necessary parties to actions resulting in judgments and decrees. The reason why this section cannot be so construed as to require persons to be made

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parties who are unnecessary, is, that to do so brings it into conflict with the section of the code already referred to.

The law requires us to construe these two sections *in pari materia*, and to give effect to each if possible. *State v. Rackley*, 2 Blackf. 249; *Indiana Central Canal Co. v. State*, 53 Ind. 575; *Stout v. Board, etc.*, 107 Ind. 343.

To construe the section last quoted so as to require persons to be made parties who are unnecessary parties, is to bring it into conflict with the section of the code referred to. But it may be harmonized with that section by construing its requirements as to parties to relate to such parties, and to such parties only, as are necessary parties. Any other construction requires us to conclude that the legislature intended to declare by law that in certain cases persons should be made parties to certain actions who are wholly unnecessary, and that a failure to make unnecessary parties should cause the overthrow of the judgments and decrees of the courts in such proceedings. It is too clear for controversy that the legislature had no such intention.

And the inquiry naturally arises, why is it not necessary to make the wife a party when her husband's land is to be taken to make a public highway, or when the same is to be appropriated upon compensation for a railroad right of way? The only answer to this question is that if she were made a party there is nothing that she could do to protect her inchoate interest. There is no answer she could make that would qualify or prevent the appropriation. She could only answer, "I am the wife of the owner" and that fact would be disclosed by the complaint, if she were made a party. There is no issue she could tender, and no issue could be tendered to her. Therefore, if she were made a party to such a proceeding, she would not be

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a party to any issue, nor could she, as such a party, do anything to protect her inchoate right.

The cases to which we have referred show that the section last cited has not been given such a broad scope in meaning by this court as to allow a surviving wife to recover her third in lands of her husband, taken without her becoming a party thereto, in the various modes of appropriation enumerated above, though its sweeping language would, at first blush, seem to warrant a contrary ruling. The leading idea in the section is that she must be a party to certain acts or proceedings touching her inchoate interest. It evidently was not intended by the latter clause of the section to make any new law on the subject of necessary parties. The provision was enacted in view of the law as it then and still exists as to parties. In other words, it would be absurd to suppose the legislature meant that the wife should be made a party in those cases where it could affect nothing, as well as those cases where it could. And the law requires us to adopt that construction which leads to no absurdity, if the statute is susceptible of such a construction. *Mayor, etc., v. Weems*, 5 Ind. 547; *Storms v. Stevens*, 104 Ind. 46. There are many cases within the purview of the section, if the wife was made a party, wherein it would enable her to protect her inchoate interest. But we have seen that this court has held, in the face of the section in question, that in appropriations of the husband's land by the exercise of the power of eminent domain, or in dedication of lands for public uses on compensation, the inchoate interest of the wife is extinguished without her consent and without making her a party. This is at least an implied holding that there are cases falling within the unqualified language of the section where the wife's inchoate interest may be extinguished without her consent and without making her a party.

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This holding can only be upheld on the ground that the requirement of the section that she be made a party, without which her right is not extinguished, must be so construed as to require her to be made a party in such cases only as, if a party, she could prevent the extinguishment of her inchoate right, or in some way secure some benefit to herself on account of that right. Where she could not accomplish any of these things if made a party, it is idle to say that the legislature intended by the section quoted to require her to be made a party, and for failure to do such an idle and nugatory act her interest should not be extinguished and the partition sale be overthrown. We shall hereafter see that it could not possibly benefit her to make her a party to partition proceedings of lands where her husband is a co-tenant, any more than in cases of appropriation of her husband's land in the exercise of eminent domain, or in dedications thereof to public uses.

Some reliance is placed by the appellee upon the code of civil procedure to support the contention that she was a necessary party to the partition sale. Section 626, 2 Gavin & Hord, p. 288, then in force, required the pleadings and practice in partition proceedings to conform to the code. Two sections of the code as it then and now stands are relied upon to establish that appellee was a necessary party to the partition proceedings. Section 17, 2 Gavin & Hord, p. 45, provides that "all persons having an interest in the subject of the action, shall be joined as plaintiffs."

Appellee's husband was one of the plaintiffs in the partition proceedings resulting in the sale, but her learned counsel do not say whether she ought to have been a plaintiff or a defendant. Her counsel also quote and rely on section 18, 2 Gavin & Hord, p. 46,

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which provides that "any person may be made a defendant who has, or claims, an interest in the controversy, adverse to the plaintiff, or who is a necessary party to a complete determination or settlement of the question involved." The latter clause of this section is confessedly the one, and the only part of either section, that has any bearing on the question before us. And it requires no one to be made a party defendant except he be a necessary party.

This lands us back where we started, to begin afresh with the inquiry: Who are necessary parties? We have already seen that the wife is not a necessary party to proceedings to appropriate her husband's land, and to dedications thereof for public uses.

This court has indirectly decided in *Paulus v. Latta*, 93 Ind. 34, that she is not a necessary party either in partition suits where her husband is a co-tenant or in appropriation or dedication cases, in holding that her inchoate interest is not the subject of an action. On page 38 of that case it is said: "The appellee suggests that the complaint contains a good cause of action against Paulus to remove the cloud upon her inchoate interest as the wife of the defendant Latta. But such inchoate interest is not a present estate, it cannot be conveyed by itself. *McCormick v. Hunter*, 50 Ind. 186. It gives no right of entry. *Strong v. Bragg*, 7 Blackf. 62. It is not the subject of an action; it constitutes no diminution of the husband's present estate; he may convey his entire estate without her, and the purchaser will hold it subject only to be divested of one-third of it on certain contingencies." If the inchoate interest of the wife is not the subject of an action while the husband lives, it would seem to follow that it would not be the subject of a defense. And even one of the cases cited by appellee, *Thompson v. McCorkle*, 136 Ind. 484, affords strong support to this po-



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sition in holding that, "By virtue of this statute, during the lifetime of the husband, the wife had an inchoate right in the real estate in controversy contingent upon her surviving him, and which could not become absolute except by his death. Her claim during the entire interval was in such a position that it could not be asserted by anyone. The case was not one of mere disability growing out of coverture. Strictly speaking, she had no estate in the premises, it was a mere expectancy." If she had no estate in the premises, had nothing but a mere expectancy, which could not be asserted by anybody, what necessity was there to make her a party? Certainly none, if we are to follow logic and sound reason. If there was no necessity to make her a party, then she was not a necessary party within the meaning of the provisions of the code of 1852 quoted above.

Barbour on Parties, at page 330, says: "No one need be made a party plaintiff in whom there exists no interest; and no one need be made a party defendant from whom nothing is demanded. A mere contingent interest is insufficient. \* \* \* No one need be made a party who disclaims all interest in the controversy; nor one who would not be at liberty to answer, and contest the right to the relief prayed for." The author cites the following adjudged cases that fully support the text: *Kerr v. Watts*, 6 Wheat. (U. S.) 550; *Bailey v. Inglee*, 2 Paige 278; *Lee v. Colston*, 5 Monroe (Ky.) \*238.

Now let us inquire whether the appellee could have affected anything in the way of the protection of her inchoate interest if she had been made a party. All the authorities on both sides of the question we are discussing agree in holding that the inchoate right of dower, or the inchoate right of the wife to one-third of her husband's land, subsists by virtue of the seizin

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of the husband; and that this right is always subject to any incumbrance, infirmity, or incident which the law attaches to the seizin, either at the time of the marriage or at the time the husband became seized. A liability to be divested by a partition sale is an incident which the law affixes to all estates of co-tenants, and the inchoate right of the wife of such co-tenant is subject to this incident, unless it is superior to and independent of the husband's title, and that would hardly be contended for by any one.

They also likewise agree that if she is made a party she cannot prevent a partition, and, in a proper case, she cannot prevent a partition sale. They also agree that in case the real estate can be divided according to the interests of the co-tenants, the decree is binding on the wife of a co-tenant without making her a party to the proceedings. It is also agreed by the authorities referred to that the wife's interest in the husband's share, without her presence in court, or any order of court, will at once attach to the portion set off to him. This concession carries with it the logical sequence that the wife of a co-tenant is not a necessary party to a partition proceeding, whether there is a sale or not.

But, suppose she is made a party, in such a case where a sale is to take place, what can she do? The partition statute then, and still in force, practically answers the question. It provides that: "The moneys arising from such sale after payment of just costs and expenses, shall be paid by such commissioner to the persons entitled thereto, according to their respective shares." Section 23, 2 *Gavin & Hord*, p. 365. We have seen that the wife of a co-tenant has no share in the lands of her husband while he lives. Therefore, no money can be paid to her on such a sale, even if she be made a party, unless there is some other statute or

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law that modifies or radically changes this statute by expanding its provisions so as to require the payment of only a part of the proportion of the proceeds of the sale due to the co-tenant, according to his share of the real estate, who has a wife, and requiring the balance to be paid to her. We know of no such statute. On the contrary, the only law that confers on her the interest she holds in her husband's real estate is the section of the statute first above quoted. By it all her rights in her husband's real estate of which he was seized at any time during the marriage, and in the conveyance of which she did not join, is created and conferred, and by it her rights therein must be measured and limited. And by it no right in such real estate can ever become consummate or vested in her so as to enjoy, possess, or control it, unless she becomes his surviving widow. If, therefore, any portion of it is ever handed over and delivered to her to enjoy and possess before the happening of that event, it must be by virtue of judge-made law. And it is universally agreed that judge-made law is bad law, not because such law may not be just, but because under our system of jurisprudence, and by the constitution all law-making power has been carefully withheld from the courts, and exclusively vested in the legislature. See Constitution, article 4, section 1, section 97, Burns' R. S. 1894 (97, R. S. 1881); also Constitution, article 3, section 1, section 96, Burns' R. S. 1894 (96, R. S. 1881).

It is true that such inchoate interest, while it cannot be conveyed separate from her husband's title, yet she may release it by joining with her husband in the conveyance of his real estate. And the release thus made by the wife is a sufficient consideration to support a promise to her. *Jarboe v. Severin*, 85 Ind. 496; *Green v. Groves*, 109 Ind. 519; *Worley v.*

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*Sipe*, 111 Ind. 238; *Howlett v. Dilts*, 4 Ind. App. 23; *Worth v. Patton*, 5 Ind. App. 272. But that is the subject of contract and not the institution of the statute.

If the courts undertake to hand over to the wife a portion of the husband's share of the proceeds of a partition sale, it may result in giving her a part of her husband's real estate to own and control, though the event never happens upon which her right to do so is by the statute expressly made to depend, namely, to become his surviving widow. Either of two contingencies may happen by which she may never become his surviving widow. One is, she may die first; and the other is that the marriage may be dissolved by a divorce. And yet, if any portion of the husband's share of the proceeds of a partition sale were given her by the courts, she would be possessing and controlling it in violation of the statute that creates, measures and limits her rights in her husband's real estate.

It was wisely supposed by statesmen and lawyers that it required an express legislative enactment to make the inchoate interest of the wife become absolute and vest in her during the life of the husband, as seen by the act of 1875, in case of judicial sales of her husband's real estate. Section 2669, Burns' R. S. 1894 (2508, R. S. 1881).

That act does not apply to this case so as to enable the courts to give the wife a portion of the husband's share of the proceeds of a partition sale, for two reasons. First, it was not in force when these proceedings took place; and, secondly, the second section thereof provides that it shall not apply to sales of real estate upon judgments rendered prior to the taking effect of the act; nor to any sale of real property of the value of \$20,000.00 and over, nor to the sale of real property of the aggregate value of \$20,000.00 and over,

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except to so much of such real property as shall not exceed in value the sum of \$20,000.00; thus indicating the legislative intent to deal with creditors' judicial sales, and not partition judicial sales.

So the conclusion seems absolutely irresistible that there is no law in this State authorizing the courts to award to the wife of a co-tenant any portion of her husband's share of the proceeds of a partition sale. On the contrary, the express provision of the partition statute, then and now in force, imperatively requires, as we have seen, that the whole of his proportion of the proceeds of the sale, according to his share in the real estate, shall be paid over to him.

Therefore, the latter clause of section 2660, Burns' R. S. 1894 (2499, R. S. 1881), which is the same as section 35 of the law of descent of 1852, providing that no "Sale, disposition, transfer, or incumbrance of the husband's property, by virtue of any decree, \* \* \* to which she shall not be a party, \* \* \* shall prejudice or extinguish the right of the wife to her third in his lands," etc., must be held to have no application to a case like the present, where to have made her a party could not have availed her anything, and to apply only to such cases as would have been of some possible benefit to her to have made her a party.

Some of the authorities, in view of this line of reasoning, intimate that her inchoate interest cannot be extinguished by a partition sale, whether she be made a party or not. Whether it can or not must be determined by a consideration of the probable legislative intent as disclosed in the several statutes referred to. To hold that it could not, would involve the necessity of holding that the mere inchoate right, the mere expectancy, the mere possibility of a vested or consummate estate, without ever vesting or becoming consummate, may destroy the absolute vested estate

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of the husband, or a part of it. If such a sale cannot extinguish her inchoate right, even though she be made a party, then her husband's interest must sell for much less, perhaps a third less than its actual value. She may die before her husband, or be divorced, in either of which cases her inchoate interest is gone, and one-third in value of her husband's interest is gone for nothing; in other words, it is destroyed by trying to keep alive a mere possibility of an estate in her. This brings us to the question as to whether one of these rights is paramount to the other. The authorities holding that a partition sale extinguishes the wife's inchoate right, hold that the right to partition in a co-tenant is paramount to the inchoate right of the wife, for the reason, we presume, that her interest or right exists by virtue of her husband's seizin, and therefore, is subject to the incidents, incumbrances and infirmities attaching to that seizin, the right to compel partition by sale being one of the incidents attaching to such seizin. But there is another reason why the right to partition by sale is paramount to the inchoate right of the wife of a co-tenant, and that is the co-tenant's title is an actual present existing estate in the real property, whereas the inchoate right of the wife therein is only the possibility of such an estate accruing to the wife dependent upon uncertain future events which may never happen, and, therefore, such estate may never exist. To hold that the co-tenant's right to partition is not paramount to his wife's inchoate right, is to hold that a present absolutely existing estate is not superior and paramount to a mere possibility of the existence of such an estate. That a mere possibility of an estate, which may never ripen into such estate, may destroy an absolutely existing estate. In other words, it is to hold that the mere shadow may destroy the actual existing substance.

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The right of partition, where a sale is necessary, and the inchoate right of the wife of a co-tenant, cannot both exist. One or the other of these rights must give way and be submerged. It ought not, in reason it can not be the paramount right. Therefore, it must be the inferior right that is submerged.

In support of the contention that a partition sale, in the absence of the wife of a co-tenant as a party, was intended not to extinguish the wife's inchoate right, we are cited to section 21, 2 Gavin & Hord, p. 365, which has been substantially continued in force by the revision of 1881. It reads thus: "Whenever it shall appear to the court that the purchase-money for the land sold has been duly paid, the court shall order such commissioner, or some other person, to execute conveyances to the purchaser, which shall bar all claim of such owners to said lands as effectually as if they themselves had executed the same."

Great confidence in this statute seems to be entertained by appellee's learned counsel as affording strong support to his contention. That is, that by its terms the deed in a partition sale is to have the same force and effect as if the owners themselves had executed the same, and no more. And if the owners themselves had executed the deed it could not extinguish or release their wives' inchoate rights therein. But it is believed that this confidence is wholly misplaced, for two reasons, at least. If the intent of the statute is to give no greater effect to the deed than if executed by the owners, then it establishes the unreasonable proposition intimated in some of the decisions that the inchoate right of the wife of a co-tenant cannot be extinguished by such a sale, even though she were made a party. Because if the deed is to have no greater effect than if made by the owners, then it is to have no greater effect than if executed by the co-tenant,

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without his wife, she not being an owner. If she is an owner, within the meaning of the statute, then her right is barred, for the statute makes the deed "bar all claim of such owners to said lands." Secondly, the manifest intent of the legislature, as disclosed by an examination of the whole partition statute, was that the deed should be effectual to convey the land to the purchaser absolutely. And the language employed is sufficient to make the deed have that effect in the generality of partition sales, and such sales alone were evidently in the mind of the legislature when they employed the language they did. And yet, a full consideration of the whole statute leaves no doubt in the mind that the intent was to make the deed effectual to convey the land absolutely to the grantee. Because everyone knows that many, very many, co-tenants are married women, infants, idiots, and persons who are *non compos mentis*, and, as owners, wholly incapacitated to make a deed that would convey their interest in the land. The married woman could not convey for want of her husband joining with her therein. And the strict language of the statute is that the deed is to be as effectual as if the owners had themselves executed the same. And yet, no one could be found that would contend that a partition sale and deed would be ineffectual to convey the title of a co-tenant who is a married woman, an infant, a *non compos mentis*, or a lunatic, under the operation of the statute quoted. This must be so, because it was the evident intent, as gleaned from the several parts of the whole statute, that a partition sale and deed should be effectual to convey the land of the several owners absolutely, and vest the owners' title thereto in the purchaser.

The settled law requires us to give effect to that intent, so as to make it prevail over the literal import



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of particular terms used, and control the strict letter of such terms when the letter would lead to injustice, as would be the case here. *Smith v. Moore*, 90 Ind. 294; *City of Indianapolis v. Huegele*, 115 Ind. 581; *Lime City, etc., Ass'n v. Black*, 136 Ind. 544; *May v. Hoover*, 112 Ind. 455; *Parvin v. Wimberg*, 130 Ind. 561; *Storms v. Stevens*, 104 Ind. 46; *Stout v. Board, etc.*, 107 Ind. 343.

It follows, from what we have said, that, upon principle, the partition sale and deed in question vested in the purchaser the entire title to the real property in question and extinguished the inchoate interest of the appellee therein.

We will now consider how the question stands upon authority. It is claimed that the rule established by the courts of New York is that a partition sale does not extinguish the contingent right of the wife of one of the co-tenants. The decisions of that state are conflicting. The condition of the adjudications on the question in New York is so accurately and tersely stated by Mr. Freeman, in his work on Co-Tenancy and Partition, in section 474, at pages 630, 631, that we appropriate his language: "Hence, we find Chancellor Walworth stating that, 'as a feme covert cannot be bound by a decree against her in a partition suit to which she is not a party, it seems to be proper, in all cases where a sale of the property will probably be necessary, that the wife should be joined with her husband as a party to the suit, so that the purchaser's interest in the premises may not be charged with her contingent claim of dower.' But Vice Chancellor McCoun, of New York, held that it was immaterial whether the wife was made a party to the suit or not, 'because a decree for sale and conveyance by a master will not bar her right of dower in her husband's share of the lands in the event of her surviving him.' He justified

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this decision on the ground that, as nothing in the statute of that state expressly declared 'a divestment of the dower initiate of a wife of a joint tenant or tenant in common upon a sale, nothing so materially affecting her legal rights ought to be taken by implication.' The same vice chancellor, in a subsequent case, expressed similar views, and sustained them with some very clear and satisfactory reasoning. On appeal, this portion of the vice chancellor's decision was reversed by the chancellor, who determined: first, that the statutes of the state, though containing no direct provision on the subject, clearly contemplated that the wife's right of dower should be discharged by the partition sale, 'and that a purchaser under the judgment or decree will be protected against any future claim on her part, both in equity and at law;' second, that it was the duty of the court to make such disposition of the sale 'as may be necessary to secure to the wife a fair equivalent for the value of her contingent right of dower, in case she survives her husband.' From this decision of the chancellor an appeal was prosecuted to the court of errors. In this court the only opinions given were those of Bronson, judge, and Verplanck, senator. The former agreed with the vice chancellor, holding: first, that the wife's right of dower was not affected by the sale; second, that the direction to invest a just portion of the proceeds of the sale for the benefit of the wife was an assumption of legislative prerogative. Senator Verplanck concurred with the chancellor. Both the judge and the senator united in the view that the decision of this question was immaterial, and the case was therefore disposed of on other grounds. So the question of the effect of a sale in partition upon the dower interests of the wives of co-tenants, in the absence of provisions of the statutes directly controlling the subject, may be considered as still unsettled

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in New York. Its further discussion was rendered unnecessary by the passage, in the year [1840] succeeding the final decision of *Jackson v. Edwards*, of a statute providing for the interest of the wife in accordance with the suggestions and directions contained in the opinion of the chancellor, to which we have before referred. But in other states where the question has arisen, the courts have been disposed to treat the sale in partition as conveying title paramount to the wife's right of dower." And that is what the New York statute provides for.

So it must be regarded that the New York decisions, being both ways, and no final determination of the question ever having taken place in the court of last resort in that state, the adjudications there do not place that state on either side of the question.

In *Weaver v. Gregg*, 6 Ohio St. 547, 67 Am. Dec. 355, it is held, in a very able opinion by Brinkerhoff, J., speaking for the whole court, that a partition sale and deed without making the wife of a co-tenant a party extinguishes her inchoate right of dower, under statutes similar to our own, and passes the entire estate to the purchaser. Appellee's learned counsel contend that the case just cited has been overruled by the Supreme Court of Ohio in the following cases: *Black v. Kuhlman*, 30 Ohio St. 196; *Unger v. Leiter*, 32 Ohio St. 210; *Dingman v. Dingman*, 39 Ohio St. 172; *Mendel v. McClave*, 46 Ohio St. 407, 22 N. E. 290. We have examined these cases and find they do not even touch the subject, much less do they overrule the doctrine laid down in *Weaver v. Gregg*, that a partition sale extinguishes the inchoate right of dower of the wife of one of the co-tenants without making her a party. The following cases hold to the same doctrine announced by the Ohio Supreme Court: *Lee v. Lindell*, 22 Mo. 202, 64 Am. Dec. 262; *Hinds v. Stevens*, 45 Mo.

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209; *Davis v. Lang*, 153 Ill. 175, 38 N. E. 635; *Sire v. City of St. Louis*, 22 Mo. 206; *Mitchell v. Farrish*, 69 Md. 235, 14 Atl. 712; *Holley v. Glover*, 36 S. C. 404, 16 L. R. A. 776, 15 S. E. 605.

The only case of a court of last resort holding a contrary doctrine is *Greiner v. Klein*, 28 Mich. 12. And this adjudication stands alone against the great current of adjudged cases in the United States. It alone supports appellee's contention.

There is sufficient difference between the Michigan partition statute and our own to furnish some plausible reasons for reaching the conclusion arrived at by the Michigan Supreme Court, and especially as the Michigan statute was literally borrowed and copied from the New York partition statute; and at the time the Michigan decision was made the prevailing view of the New York courts was such as to lead to the Michigan decision. And yet the reasoning is very faulty by which the majority of the Michigan court reached their conclusion. An able dissenting opinion was delivered by Justice Campbell in a course of reasoning so conclusive and unanswerable as to greatly weaken, if not to destroy, the force of the prevailing opinion as authority outside of the state of Michigan.

We therefore conclude that the overwhelming weight of judicial opinion is against appellee's contention.

Washburn on Real Property states the law thus: "The wife of a tenant in common holds her inchoate right of dower so completely subject to the incidents of such an estate, that she not only takes her dower out of such part only of the common estate as shall have been set off to her husband in partition, but if by law the entire estate should be sold in order to effect a partition, she loses by such sale all claim to the land, although no party to such proceeding." 1 Washb. Real Prop. 208, \*p 158.

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We therefore conclude, both upon principle and the overwhelming weight of authority, that appellee was not a necessary party to the former partition proceedings, and that the sale and deed therein extinguished her inchoate right to one-third of her husband's share therein. Hence, the superior court erred in its conclusions of law.

The judgment is reversed, with instructions to the trial court to restate its conclusions of law in conformity to this opinion, and to render judgment accordingly.

JORDAN, J., dissents.

DISSENTING OPINION.

JORDAN, J.—I am compelled to dissent from the conclusion reached in the opinion of the majority of the court in this case.

The material and undisputed facts are, in brief, as follows: Appellee, Mary J. Wagner, and Peter Wagner were married on November 22, 1855, in Clay county, Indiana, where they lived together as husband and wife until May 11, 1887, on which date the husband died intestate, leaving an estate of less than \$5,000.00, and left surviving him, as his widow, said Mary J., together with five children. At and prior to May 16, 1856, Peter Wagner, the husband, was the owner in fee of an undivided interest in a tract of land of about six acres, situated in Marion county, Indiana, out of which the lots in dispute have been carved. At said date, he and some ten other persons, held the aforesaid tract, undivided, as tenants in common. On said 16th day of May, 1856, proceedings for partition were instituted by said Peter Wagner and others of his co-tenants against their co-tenant, George Wagner, in the common pleas court of said county. At the

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hearing of the cause, the land sought to be partitioned was found not to be susceptible of division, and the same was by the court ordered to be sold as an entirety, and David S. Beaty was appointed a commissioner to make the sale; and in pursuance of such order, he sold said real estate to William Smith, and executed to him a commissioner's deed for the same, which deed was approved by the court, and duly recorded, and the proceeds arising from the sale were paid to and divided among the parties to the action according to their respective shares and rights. Appellee, the wife of said Peter, at the time said action for partition was commenced, was not in any manner made a party plaintiff nor defendant to said action, nor did she join in any manner therein, neither was she notified of the pendency thereof, and had no knowledge of the said partition proceedings until after the death of her said husband. She never joined her husband at any time in the conveyance of any part of said real estate, nor in any manner or form disposed by her own act of her inchoate interest therein. Through *mesne* conveyances appellant became the owner of the lots now in controversy. The only question presented, under the above facts, for decision is: Was Mrs. Wagner's inchoate interest in the land as the wife of Peter Wagner, one of the tenants in common, extinguished by the judicial sale in the partition proceedings to which she was not a party, and is she by virtue of the decree in said action barred from asserting her interest in the lands after the death of her husband?

Counsel for the appellant affirm that the inchoate right of the wife must yield to the requirements of the paramount vested interests of more than one, when, under the provision of the statute which compels partition among co-tenants, her husband's land is sold by order of the court, in order that the proceeds may

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be distributed among such tenants. That in such actions the presence of the wife of any of the latter, as a party to the partition proceedings, was not intended or contemplated by the legislature in the enactment of the statute relating to the partition of lands. Upon the part of the appellee, it is contended by her counsel, that where the premises are ordered sold in such actions she is a proper and necessary party, in that event, in order that the commissioner's deed may convey a perfect title, and, if not a party to the action, her inchoate interest is not barred.

It is a well settled rule that when actual partition is made of lands in which the husband holds an undivided moiety, the inchoate interest of the wife therein will instantly attach to the share allotted in severalty to her husband, unless fraud has been practiced upon her in the partition proceedings. This result does not depend upon any order or action of the court, but equity will shift this interest of the wife to the part set off to the husband without the former being a party to the proceedings. By this result her right is protected and preserved without her presence as a party to the suit. The result and effect of the decree when the wife is not a party, and the property in common is ordered by the court to be sold, is a debatable proposition, upon which the authorities conflict. This leads to an examination and review of those bearing upon this question. In *Jackson v. Edwards*, 7 Paige (N. Y.) p. 386, the holding seems to be that a sale, so made, does not divest the inchoate right of dower, for the reason, as expressed by the chancellor, that the court possessed no power to compel the wife to accept provisions out of the proceeds of the sale in lieu of her interest and consequent right to the enjoyment of the land itself. This case (*Jackson v. Edwards*) was carried to the supreme court of New York, see 22 Wend. 498.

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Two opinions were given in this last appeal, one by Judge Bronson and the other by Senator Verplanck. The former doubted whether the right of the wife to dower would be barred when the lands of the husband were ordered sold in a partition suit, though she be made a party thereto. Senator Verplanck was of a different opinion, and said, on page 517: "I agree, however, with the position of the chancellor, that a sale in partition divests the inchoate rights of dower of the wife of a tenant in common, *if she has been made a party to the suit*; and that purchasers under the judgment or decree will be protected against all future claims on her part." The italics are my own. And further, in this connection, on page 519, the learned Senator said: "But the policy of the law is clearly only the protection of the wife's dower against the abuse of the husband's power and his acts. Now a sale in partition cannot be the mere act of the husband. It must be shown to be necessary for the general benefit of all interested in the lands. To such a necessity, when allowed by the court, the husband's right of property gives way, either with or without his consent; then the inchoate right of dower being but an incident, must follow. It does so, not only in this case, but in many analogous ones, where private property is taken for public use and pecuniary compensation allowed, as in lands taken for streets in cities, for roads or for canals. In this instance of a partition sale, the sale is not allowed to be made for the purpose of divesting the wife's dower, but it is made because the interest of numerous joint owners demands it. The wife's future claim of dower is then divested, not by the act of her husband but by the necessary operation of law."

The judges in this case, it appears, were all of the same opinion that the wife's dower right could not be



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extinguished by a decree in an action to which she was not a party, but differed as to whether such a result could be obtained even though she were a party to the proceeding. The statute of New York relative to partition was amended in 1840 so as to authorize the making of the wife a party to such actions, and providing, further, that in the event of the sale of the premises her dower interest should pass to the purchaser, and that she should be remunerated therefor out of the proceeds of the sale. See *Jordan v. Van Epps*, 85 N. Y. 427. In the states of Ohio and Missouri it is held by the courts that sales made in actions for partition extinguish the wife's right of dower as against the purchaser, although she was not a party to the action. *Weaver v. Gregg*, 6 Ohio St. 547, 67 Am. Dec. 355; *Lee v. Lindell*, 22 Mo. 202, 64 Am. Dec. 262. In the decision of *Lee v. Lindell*, *supra* (which was by a divided court, Leonard, J., dissenting), the fact that the statute did not require the wife to be a party seems to have exerted much influence upon the court in reaching the conclusion which it did. It is there said: "There being no law requiring her to be made a party, it is not perceived how the arbitrary use of her name can impart validity to a proceeding which, without it, would not affect her." The case of *Weaver v. Gregg*, *supra*, apparently controlled to a great extent the decisions in other cases to which we refer. The rule asserted in the Ohio case was followed in *Davis v. Lang*, 153 Ill. 175, 38 N. E. 635, and in *Holly v. Glover*, 36 S. C. 404, 16 L. R. A. 776, 15 N. E. 605.

In *Rowland v. Prather*, 53 Md. 232, in which the wife was held to be bound, the order of sale was made prior to the marriage, although the sale of the land was subsequent. The Maryland Court of Appeals in this case, in referring to and quoting from *Weaver v. Gregg*, *supra*, said: "It is not necessary for us to hold that a

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wife who was not a party to the suit, as was the case there, would be bound in this state, and that the purchaser in such case would be protected by the decree and sale; and we do not mean by making the quotation to be understood as so deciding; for, in this case, no marriage had taken place when the decree was passed, and no inchoate right even had attached before the decree was obtained. As a matter of fact, the widow had knowledge of the decree, sale and distribution of the proceeds of sale. So far as the distribution of sale was concerned, she was brought in and made a party by the interlocutory petition of her husband's creditors to subject his portion to the payment of his debts. She could, and ought then to have applied for a portion in money in lieu of her dower. \* \* \* If she had been brought in before sale, all she could have obtained would have been an allowance in money."

In the appeal of *Mitchell v. Farrish*, 69 Md. 235, 14 Atl. 712, *Weaver v. Gregg*, *supra*, was again referred to. But the question as to whether it was necessary to make the wife of the tenant a party to the proceedings in partition was held to be, not necessarily in controversy. Judge Brinkerhoff, delivering the opinion of the court in *Weaver v. Gregg*, *supra*, said: "The fact that the wife was not a formal party to the proceeding in partition, does not, we think, at all alter the case. The terms of the statute do not require that she should be made a party, and we see no good reason why it should be required. On the whole, our view of the question is this: The right of dower in the wife subsists in virtue of the seizin of the husband; and this right is always subject to any incumbrance, infirmity, or incident, which the law attaches to that seizin, either at the time of the marriage or at the time the husband became seized. A liability to be

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divested by a sale in partition, is an incident which the law affixes to the seizin of all joint estates; and the inchoate right of the wife is subject to this incident. And when the law steps in and divests the husband of his seizin, and turns the realty into personalty, she is, by the act and policy of the law, remitted, in lieu of her inchoate right of dower in the realty, to her inchoate right to a distributive share of the personalty into which it has been transmuted."

In *Greiner v. Klein*, 28 Mich. 12, it has been held that a sale in a partition suit to which the wife of one of the tenants was not made a party, did not serve to bar her of the right of dower. In this decision, Cooley, J., and Christiancy, C. J., concurred with Judge Graves, Campbell, J., dissented. Graves, J., speaking for the court, said: "Before acceding to the view that such a right may be extinguished through a suit in partition by the husband, instituted and carried to completion without her being a party or being represented, and without her having any chance to be heard, we ought to find the rule of law compelling it, most clear and decisive.

"It may be said that the provisions of the partition law are not so framed and arranged, unless we go outside and supplement the law by judicial legislation, as to make it practicable to guard the wife's right, whether she be a party or not, where a sale becomes necessary.

"Were this to be admitted, it would not follow that we should assume the legislature to have intended that the right should be invaded and destroyed in her absence. At the utmost, nothing further could be inferred than that having made no adequate provision to protect her right in the event of a sale, it was not designed that a sale should interfere with the right."

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A standard author on judicial sales, says: "Nor will a sale in partition cut off the dower of a married woman, not made a party, although her husband be made such." Rorer on Judicial Sales, p. 168, section 402. Citing in support of the text, *Greiner v. Klein*, 28 Mich. 12; *Wilkinson v. Parish*, 3 Paige Ch. 653; *Jackson v. Edwards*, 22 Wend. 498. In *Knapp on Partition*, p. 25, the author says: "The wife must be made a party. She has an inchoate right of dower in the lands owned by her husband, and she must be either plaintiff or defendant in the action. The court, before it will order a sale of lands in partition, requires that all those that have an interest in them shall be made parties to the action, to the end that the purchaser may get a perfect title. Hence the wives of those entitled to the land should be made parties." Citing *Knapp v. Hungerford*, 7 Hun. 588. Again, on page 108, the same author says: "The wives of the several owners are proper parties, but not necessary parties, except in case where a sale of the premises may be necessary, and in such a case, the party suing may properly make his own wife a defendant. The other defendants have no right to complain of the fact that such a wife is made defendant, instead of plaintiff, if she does not." The decisions to which I have referred, appear, to some extent, at least, to rest, or depend rather upon local laws and local procedure, than upon any settled principle. To determine what should be the declared rule governing the case at bar, resort must be had to our own statutes relative to the interest of the wife in the husband's lands, and the character of such contingent interest, as disclosed by the former decisions of this court, must be considered. An examination must also be made of the statute under which the partition proceedings in 1856 were instituted, and the procedure by which such actions were, by the code of

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1852, intended to be controlled. Section 2652, Burns' R. S. 1894 (2491, R. S. 1881), of our law of descent, in force since 1852, secures to the wife of a deceased husband one-third in fee simple of all the real estate of which he may have been seized during the marriage, and in the conveyance of which she may not have joined in due form of law. Section 2660 of the same statute provides that: "No act or conveyance, performed or executed by the husband without the assent of his wife, evidenced by her acknowledgment thereof in the manner required by law; nor any sale, disposition, transfer or incumbrance of the husband's property by virtue of any decree, execution or mortgage to which she shall not be party (except as provided otherwise in this act), shall prejudice or extinguish the right of the wife to her third of his lands \* \* \* or preclude her from recovery thereof, if otherwise entitled thereto."

In *Grissom v. Moore*, 106 Ind. 296, 55 Am. Rep. 742, in reference to these sections, Mitchell, J., speaking for the court, said: "The inchoate right of the wife attaches as an incident to the seizin of the husband during marriage. It cannot be divested or defeated by any act or charge of the husband, nor otherwise, except in the manner above provided. It can only be barred by a conveyance in which she joins, or by some proceeding to which all estates are subject, such as the exercise of the power of eminent domain, and the like. Her interest in the lands thus owned and conveyed by the husband, in the conveyance of which she has not joined, becomes consummate on his death. It accrues by virtue of the marital relation. She does not take as heir in lands so conveyed. *Rank v. Hanna*, 6 Ind. 20; *Verry v. Robinson*, 25 Ind. 14; *May v. Fletcher*, 40 Ind. 575; *Brannon v. May*, 42 Ind. 92; *Bowen v. Preston*, 48 Ind. 367; *Derry v. Derry*, 74 Ind.

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560; *Hendrix v. McBeth*, 87 Ind. 287; *Mark v. Murphy*, 76 Ind. 534."

In the appeal of *Bever v. North*, 107 Ind. 544, it was held that the wife's interest in her husband's real estate was not an incumbrance, but an estate in the land. This court, per Elliott, J., there said: "The estate of a wife under our statute is more than a right of dower, for it is paramount to the estate of one claiming through her husband, and sweeps entirely away all title of the purchaser to the one-third interest given her by the statute. The estate of the wife is not a mere incumbrance, but is an interest in the land which goes beneath the title acquired by a purchaser from her husband. *Mark v. Murphy*, 76 Ind. 534. When the rights of the wife prevail, the title of the purchaser from the husband disappears. If this title does disappear, then, of course, the purchaser had no title which he could convey, and he cannot be permitted to aver, as against his grantee, that it was part of the consideration of the deed that the grantee should not acquire title to the land owned by the wife of a former owner unless he paid her for it. We can not regard the interest of the wife as an incumbrance, for it is an estate in the land itself. We cannot regard the estate of the wife as a mere right of dower, for there is no reversionary interest in the party who claims through the husband. The title of the wife, when it vests, is absolute as against a grantee of the husband, so that it does not merely incumber the land, but tears up the title from the very roots. It is not like the lease of a life-estate, for there the reversion is in the lessor, and he succeeds to the fee upon the determination of the life-estate. Here the fee never vests in the grantee of the husband. We cannot, therefore, regard as of controlling force the authorities which hold dower rights and life-estates to be mere incumbrances."

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Where the husband is seized of lands during the coverture, but the same have been conveyed without the wife joining, under section 2491, *supra*, she does not take as heir, but as a purchaser for value, as marriage is the highest consideration known to the law. *Richardson v. Schultz*, 98 Ind. 429, and authorities cited; *Grissom v. Moore*, *supra*.

In *Thompson v. McCorkle*, 136 Ind. 484, it was held that the wife's inchoate interest was not, under the facts there stated, divested in the real estate of her husband sold for taxes. On page 499, this court said: "It is true the legislature may declare that a wife's inchoate interest shall be divested by a tax sale, and a conveyance of the land thereunder, but our law-makers have not so provided, and until it has been so enacted by clear and express words, her contingent interest should not be destroyed by judicial decision. This interest is in lieu of and is analogous to dower, except it has been enlarged from a life estate to a fee, and is guarded by more jealous care by legislative enactment and judicial decision."

These decisions will fully serve to show the character of the interest with which the wife is vested in the realty of her husband under the provisions of the statutes of this State, and the manner in which it is favored and protected under the law as interpreted by the adjudications of this court.

Courts of sister states hold similar views in regard to the dower interest of the wife in the lands of the husband. Judge Bradbury, speaking for the court in *Mandel v. McClave*, 46 Ohio St. 407, on p. 414, said: "It is property; its value can be ascertained. More than this, it is a favorite of the law. \* \* A provision made for her support. \* \* \* She is a purchaser. The inception of her right was earlier than that of the creditors; it began with the marriage and

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seizin of the husband. \* \* \* This favorite of the law is entitled to protection equal to that accorded to her other property." To the same effect is the holding of the court in *Black v. Kuhlman*, 30 Ohio St. 196; *Unger v. Leiter*, 32 Ohio St. 210.

In *Shell v. Duncan*, 31 S. C. 547, on page 567, of the opinion of Mr. Justice McIver, it is said: "Nothing that the husband may do can in any way affect it. From this, it follows that when the right, title, and interest of the husband is sold, either directly by himself or through the medium of an officer of the law, the purchaser takes no more than what was sold—the right, title, and interest of the husband, which does not include the dower interest—hence the purchaser must take his title subject to the wife's right of dower." See 5 Am. and Eng. Ency. of Law, p. 885.

In *Simar v. Canady*, 53 N. Y. 298, on page 304 of the opinion of the court, it is said: "We think that it must be considered as settled in this state, notwithstanding *Moore v. Mayor*, and some *dicta* in other cases, that, as between the wife and any other than the state, or its delegates or agents exercising the right of eminent domain, an inchoate right of dower in lands is a subsisting and valuable interest which will be protected and preserved to her, and that she has a right of action to that end."

It is seen that this interest is an actual one in the lands of the husband, which, in the event of the death of the latter, passes into a fee, and that it is considered by the law in the sense of property, and as such ought to be accorded protection by the courts. Keeping in view the principles enunciated by the decisions heretofore cited, and the sweeping force and effect of the above mentioned sections of the statute of descent, I may proceed, in the light of these and other statutes and decisions to which I will refer, with the investi-



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gation of the cardinal question involved. It is clear that when this inchoate right once attaches to the real estate of the husband, there is no privity of the wife with him respecting such interest in his lands. It is a universal, undisputed rule that a judgment or decree of a court is not binding on any one not a party thereto, or in any way represented by, or in privity with a party to the action or proceedings. Hence, it cannot be said that the appellee herein is concluded upon the grounds of privity with her husband. An act concerning the partition of lands was approved May 20, 1852, 2 Gavin & Hord, p. 361. The first section of this statute provided that "all persons holding lands as joint tenants, or tenants in common, \* \* \* may be compelled to divide the same in the manner provided in this act." The second section provided that the petition should set forth a description of the premises and the rights and titles of the parties therein interested. Section 18 made provision for the sale of the lands in the discretion of the court when the commissioners reported that a division could not be made. Under section 20 such sale was required to be made by a commissioner appointed by the court. Section 21 provided upon the payment of the purchase money "the court shall order such commissioner, \* \* \* to execute a conveyance to the purchaser, *which shall bar all claim of such owners to said land as effectually as if they themselves had executed the same.*" The italics are mine. Section 23 provided for the distribution of the proceeds of the sale by the commissioner to the persons entitled thereto, according to their respective shares, under the direction of the court.

On June 18, 1852, an act concerning the civil procedure of courts and their jurisdiction was approved, being the code of 1852. See 2 Gavin & Hord, p. 33; section 626 of this code providing that: "Actions may

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be brought for the partition of lands, \* \* \* held or possessed by joint tenants; or tenants in common, in all cases; and the pleadings and practice in such actions shall conform to the provisions of this act." By section 17, it was required that: "All persons having an interest in the subject of the action, and in obtaining the relief demanded, shall be joined as plaintiffs," etc. Section 18 provided as follows: "Any person may be made a defendant who has, or claims, an interest in the controversy, adverse to the plaintiff, or who is a necessary party to a complete determination or settlement of the questions involved." Section 22 provided that: "The court may determine any controversy between the parties before it, when it can be done without prejudice to the rights of others, or by saving their rights; but when a complete determination of the controversy cannot be had, without the presence of other parties, the court must cause them to be joined as proper parties," etc. It appears that under the requirements of section 626, *supra*, that the pleadings and practice in partition suits must conform to the provisions of the code, which certainly included those provisions pertaining to parties to an action.

In *Martindale v. Alexander*, 26 Ind. 104, it is said: "The code provides a uniform proceeding for all existing rights, whether in law or equity, including the partition of real estate."

In *Milligan v. Poole*, 35 Ind. 64, in referring to proceedings in partition, it is said: "Ample provision is made for ascertaining and settling the rights of the parties interested in the land, and if the land cannot be divided without damage to the owners, and consequently has to be sold, the court has power to adjust and secure the rights of the parties in the proceeds of such sale. And whether those rights be legal or

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equitable, they are equally within the cognizance and protecting power of the court. \* \* \* To give validity and effect to a partition, all persons interested should be made parties to the suit. If they are not, their interest will not be affected by the proceeding, but will remain as before." See, also, *Schissel v. Dickson*, 129 Ind. 139.

This court, in construing section 18 of the code, *supra*, in *Bittinger v. Bell*, 65 Ind. 445, declared that: "The parties who ought to be and must be made defendants, under this section of the code, as we construe it, are the parties in interest adverse to the plaintiff, an interest involved in the issue, and who, of necessity, will be and must be affected by the judgment in the cause. So, also, any person, 'who is a necessary party to a complete determination or settlement of the questions involved,' must, by the letter of the statute, be made a defendant to the action. These are the rules which govern pleadings in chancery, in relation to necessary parties, and these rules were substantially re-enacted, in our code of practice, as applicable alike to all suits at law as well as in equity, 'without distinction between law and equity.' *Newcomb v. Horton*, 18 Wis. 566; Story, Eq. Plead., chap. 4; Lube, Eq. Plead., chap. 3; Mitford, Plead. 164, and Moak's Van Santvoord, Plead. 105"

The question in regard to the necessity of making the wife of a co-tenant a party in an action in partition seems to have been again considered and decided by the supreme court of New York, in the case of *Ripple v. Gilborn*, 8 Howard 456. The case of *Jackson v. Edwards*, *supra*, and the purpose of the statute of 1840, were both referred to and considered by Crippen, J., in delivering the opinion of the court in that appeal. In the course of the opinion in that case, it is said: "The next question in the case, is whether the

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plaintiff's wife is a necessary party to the action. The statute declares that the widow shall be endowed of the third part of all the lands whereof her husband was seized of an estate of inheritance at any time during the marriage. (Title 3, of chap. 1, of part 3, of the R. S., section 1.) By the sixteenth section of the same act it is declared that no act, deed or conveyance, executed or performed by the husband without the assent of his wife, evidenced by her acknowledgment thereof, in the manner required by law, to pass the estate of married women, and no judgment or decree confessed by or recovered against him, and no laches, default, covin or crime of the husband shall prejudice the right of the wife to her dower, or preclude her from the recovery thereof.

"The wife, in equity, has an inchoate right of dower resting upon the contingency of her surviving her husband, and in cases of partition, when the premises can not be divided, and are ordered to be sold, the inchoate right of the wife becomes vested in her, so that she is at once entitled to her equitable portion of the avails of such sale. \* \* \* I have examined the case in 7 Paige, of Jackson and wife agt. Edwards and others, with much care. The Chancellor in that case has very fully discussed the question as to the rights of the wife in cases of partition, and I am unable to see, according to the law of that case, how the plaintiff can go on with this action without making his wife a party plaintiff. I am satisfied that the act of 1840, (Chap. 177.) in no manner interferes with the question of parties to the action. It only provides for settling the rights of married women, by adopting the same rule suggested by the Chancellor, in the case above cited, for ascertaining the value of the inchoate right of dower of married women in the premises. in cases where a sale is ordered, and of securing to them the

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money, by investment, etc. This act also authorizes a married woman to release her contingent inchoate right of dower to her husband. I have no doubt, that the provisions made by this statute, were induced by the law, as expounded and settled by the Chancellor, in the case of *Jackson v. Edwards*, above cited. It was argued in January, 1839, and no doubt decided prior to the passage of the act of April 28, 1840. I regard it as a legislative approval and confirmation of the law as expounded by the Chancellor.

"If the plaintiff's wife is not brought in as a party to the action, I am not aware of any course of practice by which the court is to be informed that he has a wife who is entitled to an inchoate right of dower in the premises. It may be that on an application in behalf of the wife, at any time before the money arising from the sale of said premises, if one should be ordered, is paid over by the purchaser, her interest therein might be protected by an order of the court; probably the same result might be attained on the applications of the purchaser to the court, in order to protect him in his title. Allow that such proceedings might be had, it only goes to show more emphatically the necessity and propriety of bringing in the plaintiff's wife as a party to the action, in order that the premises shall be freed by the decree and sale of all entanglements with the claim of the plaintiff's wife, and she at the same time be properly secured in her equitable rights, arising from a sale of said premises.

"It seems to me that the most simple and direct practice, as well as that required by the strict rules of law, is to make all persons parties, who have, by any means or contingency, an interest in the premises.

"Barbour, in his Chancery Practice, directs that whenever there is a married woman having merely an

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inchoate right of dower, it is advisable that she be made a party to the action, especially if a sale will be necessary. (2 Barbour's Pr. 288.) Whether a sale will be ordered or not is a question that cannot be determined at the commencement of the action. All necessary parties should be joined at the time the suit is brought, and if omitted, the defendant may demur, in case the defect appears upon the face of the complaint, and if not, may appear and object by plea or answer. *Baker v. Devcreaux*, 8 Paige, 513, and also the cases cited to the first point. The plaintiff in this action joined the defendant's wife as a party thereto, in order that her right of dower might be barred by the proceedings therein and by the judgment of the court; no doubt the same necessity exists for bringing in the plaintiff's wife and making her a party, and for the same reasons. Whittaker, in his Practice, says that all persons directly or indirectly interested in the *corpus* of the estate must be made parties, including the wives of parties living, in respect to their inchoate right of dower. (Whittaker's Pr., 60.) This authority seems to be directly in point, and is undoubtedly correct. If a sale of the premises shall be ordered, it is entirely clear that a complete determination of the rights of the parties cannot be had without the plaintiffs' wife being brought into the case at some period of its prosecution."

The legislature which enacted our statutes of descent substantially adopted the provisions of section sixteen of the statute of New York, referred to in the opinion of the court in the case from which I have just quoted, and incorporated them into section 2660, *supra*. In view of this fact, the above decision of *Ripple v. Gilborn*, *supra*, placing an interpretation on this section of the New York statute from which our statute was borrowed, is entitled to much weight in

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the solution of the question here involved. For it is a familiar rule, in general, that where a statute of one state is borrowed from that of another, it will be held by the courts of the borrowing state to have the meaning and force given it by the courts of the state from which it was borrowed. *City of Valparaiso v. Gardner*, 97 Ind. 1, and authorities cited.

The provision of the partition statute of 1852, which authorized the court, in its discretion, to order a sale of the premises, when they were not susceptible of division, is but a recognition to an extent, of the old chancery rule, which permitted courts of equity in proceedings for partition to do equity upon consent of all parties in interest, by ordering a sale of the land in lieu of partition, and dividing the proceeds instead, except the power under the statute does not depend upon the consent of parties. In a suit in chancery for partition the decree was only binding upon those parties who were before the court, and those whom they virtually represented, and the interests of third persons were not affected. In the exercise of equity jurisdiction in cases of partition, the court was vested with extensive power to bring all interested parties before it, in order that complete justice might be attained. Story Eq. Jur. (11th ed.), section 656; Pom. Eq. Jur., section 1390. By no means is it an easy matter to trace accurately the distinction between necessary, and what may be termed, merely as proper parties to an action; each case in a greater or lesser degree must depend upon the facts and circumstances upon which it rests. We think, however, that it is evident, in view of the provisions of the code relative to parties to an action, and to which the practice in partition suits, by section 626, *supra*, is required to conform, that in the event a sale of the lands is ordered, the wife of a tenant in common is not only a

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proper, but a necessary party defendant, in order to protect her interest involved, and also that there may be a complete determination of the controversy, and that the decree and conveyance thereunder may pass a perfect title to the purchaser, and it is the duty of the court, under such circumstances, to cause her to be made a party; and, in the event that she is not, her rights are not barred. This, we think, was the manifest intent of the legislature. We are confirmed in this conclusion, when we consider the fact that this body at the same session, and only a few days prior to the approval of the act of 1852 concerning partition, passed the statute of descents, which embraced section 2660, Burns' R. S. 1894 (2499, R. S. 1881). There is no reasonable presumption that the legislature intended, in the very teeth of the prohibitory features of this section, that in the exercise of the power granted to the court under the partition statute, to decree a sale of the land, that the presence of the wives of the tenants as parties might be dispensed with, and still that their inchoate interests therein should be divested and barred. A feature in the Ohio and Missouri cases referred to, was the fact that the statutes of those states made no provisions for making the wives of the tenants parties to a partition proceeding. The force, therefore, of these decisions, in view of the requirements of the code of 1852, to which I have referred, is materially impaired; and they can not be accepted as controlling.

In *Weaver v. Gregg*, *supra*, it was said that the wife was remitted to her share of the proceeds of sale in lieu of her dower. But if she is in no manner a party, or notified of the pendency of the action, how may she have an opportunity to demand her interest in the proceeds, and thereby protect her rights? When is she entitled to her day in court, and a protection of her right under due process of law?



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It is virtually asserted in the prevailing opinion of my brother, McCabe, that it would be an idle ceremony to make the wife of a co-tenant a party in partition proceedings, as she could not be heard to oppose neither partition in kind nor the sale of the lands; that she could not defeat a partition is true, but that she is entitled to oppose the sale of the premises by showing that they are susceptible of division is in reason and justice, under the laws of this State, undoubtedly her right. She is interested in the part to be set off to her husband, in case a partition in kind is made, and she should, therefore, also have the right, certainly, to be heard in exposing any fraud or inequality in the proceedings affecting the moiety apportioned to her husband. That she had an interest in the subject of the partition—the land sought to be partitioned—is not and cannot be controverted. That in the event it was ordered to be sold, she had an interest in the relief demanded, is equally evident, and a complete determination of the controversy, in this respect, at least, could not be had without her presence. Therefore, under such circumstances, the provisions of the code referred to, required her to be joined as a party.

Under the holding that the wife's right will be barred by the order of sale to which she is not a party, an opportunity might be presented for two or more husbands, holding valuable property as tenants in common, by acting in concert, to procure, through a partition suit, a sale thereof, without making their wives parties thereto, and the money arising from such sale might be dissipated, or seized by creditors of the husbands, and the wives of the latter be afforded no notice of such action, or opportunity to protect their interests, if any, in such proceeds.

The case at bar affords a fair illustration of the re-

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sult that might follow, as it appears that the appellee had no knowledge of the partition sale until after the death of her husband. Certainly the legislature did not intend that such rank injustice should result to the wife when it engrafted upon the statute the equitable rule permitting the court to order the sale of the real estate. But, it is claimed by counsel for appellant, that a holding that the wife is not barred by the sale under the circumstances, would result as a hardship upon the purchaser at such sales. In answer to this, it may be said that the original purchaser of the land in question, through whom appellant claims, was bound to know, under the law, what and whose interests he acquired by the sale and conveyance in controversy. He was bound to know that section 2660, *supra*, denied the right to divest her of her inchoate interest in the land under a decree of sale to which she was not a party. He was bound to know what title passed to him by the commissioner's deed, as provided by section 21 of the partition statute. With all these presumptions existing against him, he apparently did not investigate the question of title, or make any application to the court to be relieved from his purchase. The court will not compel a *bona fide* purchaser to complete his purchase and accept a deed, when it appears that the title to the land will be doubtful and may subject him to a contest to protect it. See *Harlan v. Stout*, 22 Ind. 488, and the many authorities cited in foot note to *Toole v. Toole*, 112 N. Y. 333, 2 L. R. A. 465.

When the force and effect of the several statutes to which I have referred are considered, and the fact that the right of the wife in the real estate of the husband, under the laws of this State, has heretofore been regarded and held by this court as an actual contingent interest therein; that she holds such inter-

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ests as a purchaser for value, and that the law favors her in the protection thereof, the conclusion is irresistible, in my opinion, that appellee is not barred by the decree and sale from asserting her interest in the lands in dispute. Such holding is in harmony with reason, justice, and the laws of our State. She was endowed by the statute with this interest in her husband's lands for her support and maintenance in the event she became a widow, and to hold that, under the facts, she is precluded from a recovery, is in direct opposition to the spirit and meaning of the law. The language of section 2660, *supra*, is a complete answer to the contentions of the appellant.

The decision in this case may be said to be sweeping in its effects, and establishes a precedent that will ultimately serve to plague and worry the court. If the doctrine asserted is sound, then it must follow that when lands of the husband are sold, under an order of sale in a partition action, the wife will virtually have no interest, neither in the realty, after it is sold, nor in the proceeds arising out of the sale of the husband's moiety, that she can claim; and, in such a case the creditors of the husband would occupy a position that they do not in any other case when the husband's lands are sold, and where the wife has not been estopped by her own act and not barred by being a party to a judgment or decree of a court. Such creditors, under this view of the question, would be permitted to assert their right to, and appropriate the entire proceeds of the husband's interest in payment of his debts, regardless of the rights or claims of his wife.

The act of 1875, section 2669, Burns' R. S. 1894 (2508, R. S. 1881), in effect provides that when the title of the husband in real estate shall become vested in a purchaser under a judicial sale, where the inchoate

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interest of the wife has not been ordered sold, or barred by virtue of such sale, then and in that event, her said interest shall become absolute and vest in her, in like manner and to the same extent as it would upon the death of the husband. It has been held by this court that a sale of the husband's lands by a register in bankruptcy, or by an assignee for the benefit of creditors, is a judicial sale within the meaning of this statute. See *Roberts v. Shroyer*, 68 Ind. 64; *McCracken v. Kuhn*, 73 Ind. 149; *Lawson v. DeBolt*, 78 Ind. 563; *Hall v. Harrell*, 92 Ind. 408.

In view of these decisions, and others of like import on the same point, surely it must be said that sales made since the taking effect of the act of 1875, *supra*, under the order of the court in a partition proceeding, would be judicial sales within the meaning of that statute, and, unless the wife was barred by the judgment therein by being a party thereto, her interest would vest and become absolute upon such sale and conveyance; and in the event that it had been barred by the judgment of the court, she being a party thereto, certainly her interest would be shifted or transferred to the proceeds of the sale, and she would have the right to protect it. From this conclusion, I think, there can be no escape, yet the holding in the case at bar, in effect, affirms or establishes a rule to the contrary, and to this extent the laws of the State which give her this inchoate right in the lands of her husband are rendered nugatory.

The judgment ought to be affirmed.

Board of Election Com'rs of Gibson County *et al. v. State, ex rel. Sides.*

THE COUNTY BOARD OF ELECTION COMMISSIONERS OF  
GIBSON COUNTY ET AL. V. STATE, EX REL. SIDES.

[No. 18,186. Filed November 5, 1897.]

**ELECTIONS.**—*Name of Candidate May Appear More than Once on Ballot.*—*Election Commissioners.*—*Mandate.*—*Statute Construed.*—

Under the provision of sections 18 and 26 of the election law of 1889, as amended by the act of 1891, sections 6215, 6222, Burns' R. S. 1894, the board of election commissioners may be required by mandate to print on the official ballot, under the emblem of each party respectively, the names of candidates properly certified to them by two political parties as provided in such acts, notwithstanding the same list of candidates is certified by both political parties. *pp. 677, 678.*

**STATUTORY CONSTRUCTION.**—Where any provision of an act is invalid it may be stricken out, but courts have otherwise no right to add to or take from the law as it is written, or to extend the meaning of the law beyond that which is written, when the meaning is clear. *pp. 678, 679.*

**SAME.**—*Questions of Policy and Political Morals.*—The courts in the construction of statutes have nothing to do with questions of policy and political morals; such questions are matters for the consideration of the legislature. *p. 679.*

**ELECTIONS.**—*Board of Election Commissioners.*—The board of election commissioners is not a tribunal set up for the trial of any abuses that may occur in the nomination of candidates, but must print the tickets as certified to by the proper parties. *p. 680.*

**PRACTICE.**—*Sustaining Demurrer to Special Answer.*—*Harmless Error.*—No error was committed in sustaining a demurrer to a special answer where the same evidence was admissible under the general denial, nor was such ruling rendered harmful by the subsequent withdrawal of the general denial. *p. 680.*

From the Gibson Circuit Court. *Affirmed.*

*Thomas R. Paxton and John H. Miller, for appellants.*

*W. W. Medcalf and W. E. Stilwell, for appellees.*

HOWARD, J.—This was a proceeding for mandate, brought in the name of the State by the relator, a voter of Gibson county, to require the election com-

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Board of Election Com'rs of Gibson County *et al v. State, ex rel. Sides*.

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missioners of that county to place upon the ballot to be voted at the general election of 1896, the names of certain candidates alleged to have been duly nominated for election as county officers of said county.

It is alleged in the petition for mandate that said election commissioners met on October 20, 1896, to prepare the ballot to be voted at said election; that prior thereto a convention of the Democratic party of said county had nominated a full set of county officers; that certain of those so nominated declined to stand as candidates, whereupon a second convention of said party was held at which other nominations were made in place of those who had declined; that thereafter, less than sixty days and more than fifteen days before the day of said general election, certificates of the nominations so made were duly executed by the presiding officer and secretary of each of said conventions, and such certificates were filed with the clerk of the circuit court of said county. Like allegations are made as to nominations by the People's party of said county, the nominations certified to and filed being the same as those of the Democratic party. It is further alleged that the election commissioners at their said meeting refused to recognize the certificates so filed as to the candidates nominated at the second convention of each of said parties, and resolved to print on the ballot, under the title and emblem of each party, only the names of those nominated at the first of each of said conventions, as certified to by their respective officers. The prayer is that the election commissioners be required to print on the ballot, under the title and emblem of each party all the names of the candidates nominated by each respectively, as the same were reported in the certificates filed with the county clerk by the officers of the conventions of each of said parties.

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Board of Election Com'rs of Gibson County *et al. v. State, ex rel. Sides.*

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The issuance of an alternative writ of mandate being waived, a demurrer was filed to the complaint. The overruling of this demurrer presents the principal questions for our consideration.

The law in force, at the time, prescribing the duties of county boards of election commissioners in the preparation of the ballot, so far as bears on the facts alleged in the complaint, was as follows:

In section 18 of the election law (Acts 1889, p. 166); section 6215, Burns' R. S. 1894, it was provided that "The said boards of election commissioners shall cause to be printed on the respective ballots the names of the candidates nominated by the conventions of any party that cast one per cent. of the total vote of the State at the last preceding general election, as certified to said boards by the presiding officer and secretary of such convention."

It was also provided in the same section that "In case of death, resignation, or removal of any candidate subsequent to nomination, unless a supplemental certificate or petition of nomination be filed, the chairman of the State, county, city, or township committee shall fill such vacancy."

In section 26 of the same law as amended (Acts 1891, p. 126); section 6222, Burns' R. S. 1894, it was provided that "The board of election commissioners shall cause the names of all candidates of their respective jurisdictions to be printed on one ballot, all nominations of any party \* \* \* being placed under the title and device of such party \* \* \* as designated by them in their certificate."

In support of the action of the election commissioners, counsel argue that it was not lawful for the board to place the name of a candidate more than once upon the official ballot; and they cite in support of this contention the following provision of section 19 of the

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Board of Election Com'rs of Gibson County *et al. v. State, ex rel. Sides*

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election law as amended (Acts 1891, p. 125); section 6216, Burns' R. S. 1894: "If any person has been nominated as a candidate for any office by convention, and also as a candidate for the same office by petition, his name shall be placed on the ballot but once, to-wit: In the list of candidates nominated by such convention."

It is not apparent what bearing this provision has upon the case made in the complaint for mandate. The candidates who were refused a place upon the ballot, under the titles and devices of the parties respectively, were all nominated by the conventions of the two parties. Even if also nominated by petition, the statute cited provides that the names should be placed "in the list of candidates nominated by such convention," unless otherwise requested in writing by the candidates themselves, of which request nothing is said in this case.

But it is said that the legislature must have intended that there should be perfect equality upon the ballot for all candidates; so that if a candidate nominated by convention and also by petition for the same office could have his name but once upon the ballot, in like manner, a candidate nominated by two party conventions could have his name placed there but once. To this we may say, that we can learn the intention of the legislature only by what is said in the statute. If any provision of an act is invalid it may be stricken out, but courts have otherwise no right to add to or take from the law as it is written. Besides, we cannot say that the legislature may not have had reason, deemed by it sufficient, why a nomination by convention should be regarded as more correctly representing the wishes of the people than a nomination by petition. However that may be, we are not authorized to extend the meaning of the law beyond that which is written, when that meaning is clear. It



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would be otherwise in case the language were obscure or equivocal. *Stout v. Board, etc.*, 107 Ind. 343. In the statute before us the language is clear and the meaning certain.

As to questions of policy, the effects of fusion upon political morals, and the like, so fully discussed by counsel, we have nothing to do. Those are matters for the consideration of the legislature.

It is also contended that the court had no jurisdiction in this case; that the election commissioners are given full discretion in all matters relating to the preparation of the official ballot, which discretion can not be controlled by the courts. Whether the powers of the board are in any respect discretionary we need not inquire. In the acts of which complaint is here made there was certainly no discretion. It is alleged that each of the parties named cast one per cent. of the total vote of the State at the last preceding general election; that each held its conventions for the nomination of county officers; and that, within the time prescribed by law, the names of the candidates nominated were duly certified to the election officers. In such case the duty of the board is made mandatory by the statute, the language being: "The board of election commissioners shall cause the names of all candidates of their respective jurisdictions to be printed on one ballot, all nominations of any party \* \* \* being placed under the title and device of such party \* \* \* as designated by them in their certificate." This the board did not do, but proceeded to print such tickets on the ballot as they judged the parties ought to have nominated. It was the purpose of the statute, however, that each party should nominate such persons to be voted for as the voters might themselves deem best. It was the business of the election commissioners to print the tickets as they were given to them by those who made the nominations.

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Clause Printing Press Co. *et al.* v. Chicago Trust and Savings Bank.

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If it be said that abuses might arise in the nomination of candidates, the answer is at hand. The law is sufficient to protect the rights of all persons. The courts are open for the righting of any wrong that may be suffered by any one. The board of election commissioners is not a tribunal set up for the trial of any such issues. See *Marcum v. Ballot Comrs.*, 42 W. Va. 263, 36 L. R. A. 296, 26 S. E. 281.

There was a special answer to the complaint to which a demurrer was sustained, and this ruling also is assigned as error. Except as to certain irrelevant averments, however, the special answer was but an argumentative denial of the matters alleged in the complaint; and all relevant evidence that might have been admitted under this special paragraph of answer could also have been given under the general denial. There was therefore no available error in sustaining the demurrer to the special answer; nor could such ruling be rendered harmful by the subsequent withdrawal of the general denial. *Cincinnati, etc., R. W. Co. v. Smith*, 127 Ind. 461; 6 Ency. Pl. and Prac. 357.

Judgment affirmed.

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CLAUSE PRINTING PRESS COMPANY ET AL. v. THE  
CHICAGO TRUST AND SAVINGS BANK.

[No. 18,359. Filed November 16, 1897.]

**PRACTICE.—Motion to Strike Out a Motion.**—There is no error in refusing to entertain a motion to strike out a motion.

**APPEAL AND ERROR.—Motion to Correct Record.**—A motion to correct the record of a judgment by a *nunc pro tunc* entry is not a part of the record unless made so by bill of exceptions or by an order of court.

**SAME.—Practice.—Hearing Motion to Correct a Record, Not a Trial.**—The hearing of a motion to correct the record of a judgment by a *nunc pro tunc* entry is not a trial, and the code of civil procedure

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Clause Printing Press Co. *et al. v. Chicago Trust and Savings Bank.*

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does not contemplate a new trial of such motion; the proper practice is to except to the action of the court in refusing or making the amendment, and on appeal assign such action of the trial court for error.

From the Elkhart Circuit Court. *Affirmed.*

*Henry C. Dodge*, for appellants.

*James H. State, Livy Chamberlain, John M. Van Fleet and Vernon W. Van Fleet*, for appellee.

MCCABE, C. J.—The appellee filed an application or motion to correct the record of a judgment in favor of the appellee by making a *nunc pro tunc* entry. The entry and correction sought were made. It is assigned for error that the trial court erred in overruling appellant's motion to strike out plaintiff's complaint, as it is called in the assignment of errors, but it is not a complaint; it is a mere motion. *Latta v. Griffith*, 57 Ind. 329; *Urbanski v. Manns*, 87 Ind. 585. And that said court erred in overruling appellant's motion for a new trial. There is no error in refusing to entertain a motion to strike out a motion. *Urbanski v. Manns, supra*. And that is what the action of the trial court, in effect, amounted to. *Blemel v. Shattuck*, 133 Ind. 498. Appellee's counsel object to the consideration of the question arising on the motion for the correction of the record on the ground that the motion is not any part of the record, not having been incorporated therein by a bill of exceptions. There seems to be no bill of exceptions or order of court making said motion a part of the record. It has been settled by this court that such a motion is not a part of the record unless made so by a bill of exceptions or an order of court. *Ellis v. Keller*, 82 Ind. 524; *Scotten v. Divilbiss*, 60 Ind. 37; *Conway v. Day*, 79 Ind. 318; *Elliott's App. Proced.*, section 215.

The Evansville, etc., Co. *et al.* v. Winsor, by Next Friend.

There was no available error in overruling the motion for a new trial. It has again and again been decided by this court that no pleadings are contemplated or required in a proceeding of this kind. It is a simple motion to be heard in a summary way. Nor does the action of the trial court in either refusing or granting the application and the correction of the judgment furnish any ground for a motion for a new trial. The hearing of the motion is not a trial in any proper sense and our code of civil procedure does not contemplate a new trial of such a motion nor is a new trial thereof appropriate. *Runnels v. Kaylor*, 95 Ind. 503, and cases there cited; *Blizzard v. Blizzard*, 40 Ind. 344. The proper practice is to except to the action of the court in either refusing or making the amendment, and on appeal to assign such action of the trial court for error.

There was no available error in overruling the motion for a new trial. There being no other assignment of error the judgment must be, and is affirmed.

THE EVANSVILLE ICE AND COLD STORAGE COMPANY  
ET AL. v. WINSOR, BY NEXT FRIEND.

[No. 18,167. Filed November 16, 1897.]

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**WILLS.—Contest.**—An action to set aside a will and its probate on the ground that the will has been revoked either expressly or impliedly, is an application to contest the will, within the meaning of the statutes providing for the contest of wills. *p. 685.*

**SAME.—Action to Contest is Statutory.—Statute of Limitations.**—Actions to contest the validity and to resist and set aside the probate of a will are purely statutory, and must be brought within the time and upon the grounds prescribed by the statute authorizing such actions. The right to contest is not extended or limited by the general statute of limitations contained in the code of civil procedure. *pp. 686, 690.*

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**SAME.**—*Disposition of Real Estate Governed by Law of State Where Situated.*—The disposition of real property by will is governed exclusively by the law of the state where the land is situated. *p. 688.*

**SAME.**—*Foreign Will.—Contest.—Statute Construed.*—When a foreign will devising land in this State is admitted to probate, or filed and recorded, any person interested in the estate of the testator, as provided by section 2770, Burns' R. S. 1894, may contest the same within the time prescribed. *Harris v. Harris*, 61 Ind. 117, overruled in so far as it conflicts with this opinion. *pp. 687-689.*

**SAME.**—*Probate of Foreign Will.—Petition Not Necessary.*—Under section 2768, Burns' R. S. 1894, providing that a copy of a foreign will and the probate thereof may be produced, by any person interested, to the circuit court of the county in which there is any real estate on which the will may operate, a petition is not essential to the jurisdiction of the court. *p. 691.*

**SAME.**—*Probate of Foreign Will.—Jurisdiction.*—An order of a circuit court directing a foreign will or the probate thereof to be filed and recorded as provided by section 2763, Burns' R. S. 1894, implies the finding of such facts as are necessary to give the court jurisdiction. *p. 691.*

From the Vanderburgh Circuit Court. *Reversed.*

*Alex. Gilchrist* and *C. A. De Bruler*, for appellants.

*Azro Dyer* and *L. I. Ahlering*, for appellee.

**MONKS, J.**—The facts appearing from the amended complaint, so far as necessary to the determination of the questions presented, are as follows: On the 18th day of September, 1886, Annie Stockwell Winsor, who was a married woman residing with her husband, William L. Winsor, in the state of New York, was the owner of real estate in Evansville, Indiana, and on said day made her last will, naming her husband as her sole devisee, and making no provision for a child afterwards born. On the 19th day of September, 1886, the next day after the will was executed, Mrs. Winsor, the testatrix, gave birth to a daughter, Constance A. Winsor, the appellee in this case. Said testatrix died on July 30, 1889, and left surviving, her husband, William L. Winsor, and her child, the appellee. At

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the time of her death she was the owner of said real estate in Evansville, Indiana. On the 3d day of September, 1889, said will was admitted to probate by the proper court in New York. On the 24th day of September, 1889, a copy of said will and the probate thereof, duly certified under the seal of the surrogate, and duly certified and attested as authentic as required by the laws of this State and of the United States, and as required by sections 2761-2763, Burns' R. S. 1894 (2591-2593, R. S. 1881), was presented to the Vanderburgh Circuit Court, and thereupon the proper order was made by said court and it was entered as a part of said order; that said will has the same force and effect as if originally probated in said county; that on said day in accordance with said order said copy of the will and the probate thereof was duly filed and recorded by the clerk of said court; that after said will was filed and recorded in the Vanderburgh Circuit Court, said William L. Winsor from time to time sold and conveyed parts of said real estate in Evansville, Indiana, to the Evansville Ice and Cold Storage Company, and other appellants, and they are in the possession of the real estate so conveyed. William L. Winsor died testate in the state of New York on the 8th day of September, 1894, and on the 13th day of March, 1895, the appellant, Thomas E. Garvin, Jr., was by the Vanderburgh Circuit Court duly appointed administrator with the will annexed of the estate of William L. Winsor, deceased, who duly qualified as such administrator.

It is alleged in the amended complaint that William M. Bell, by his attorney, Edward Law, presented said copy of the will of Annie Stockwell Winsor, and the probate thereof so certified and attested as required by law, to the Vanderburgh Circuit Court, and that at the time that said copy was presented to said court

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and said order was made by said court neither said Bell or Law, his attorney, was interested in said will, and it is further alleged in the amended complaint, that said will is invalid and revoked for the reason that after said will was executed said Annie Stockwell Winsor had born to her, legitimate issue, to-wit: appellee, who survived said testatrix and is now living, and no provision was made for appellee in said will, nor was she mentioned therein.

Prayer, that the said will and the probate thereof be set aside, and that the order of the Vanderburgh Circuit Court entered September 24, 1889, admitting a copy of said instrument to be filed and recorded in said court, and the record thereof by the clerk, be set aside and declared null and void, etc.

This action was commenced September 28, 1895, the amended complaint was verified as required by section 2766, Burns' R. S. 1894 (2596, R. S. 1881), which provides for contesting wills, etc.

Appellants filed an answer to which appellee's demurrer for want of facts was sustained, and, appellants refusing to plead further, judgment was rendered in favor of appellee.

As appears from the amended complaint, the will of Annie Stockwell Winsor, deceased, was filed and recorded in the Vanderburgh Circuit Court under the provisions of sections 2761-2763, Burns' R. S. 1894 (2591-2593, R. S. 1881), the last of which sections provides that such court shall order the same to be filed and recorded by the clerk, and thereupon such will shall have the same effect as if it had been originally admitted to probate and recorded in this State.

It is settled law in this State that an action to set aside a will and its probate on the ground that the will has been revoked either expressly or impliedly, is an application to contest the will within the mean-

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ing of our statutes, providing for contesting wills. *Bartlett v. Manor*, 146 Ind. 621; *Burns v. Travis*, 117 Ind. 44.

In this State actions to contest the validity and to resist or set aside the probate of a last will are purely statutory. As this court said in *Harris v. Harris*, 61 Ind. at p. 123, "They can only be brought, and successfully maintained in the court, within the time and upon the grounds prescribed in and by the statute which authorizes such actions." The same doctrine is declared in *Bartlett v. Manor*, *supra*.

Section 2766, Burns' R. S. 1894 (2596, R. S. 1881), provides that any person may contest the validity of any will or resist the probate thereof at any time within three years after the same has been offered for probate, by filing in the proper court "his allegation, in writing, verified by his affidavit, setting forth the unsoundness of mind of the testator, the undue execution of the will, that the same was executed under duress, or was obtained by fraud, or any other valid objection to its validity or the probate thereof."

It is provided by section 2771, Burns' R. S. 1894 (2601, R. S. 1881), that "Infants and persons absent from the state or of unsound mind shall have two years after their disabilities are removed to contest the validity or due execution of such will." Said sections and the act of which they form a part became a statute in 1852.

In 1859 the General Assembly passed section 2770, Burns R. S. 1894 (2600, R. S. 1881), which provides that when a foreign will has been "admitted to probate, or which \* \* \* may be offered for record and filing in any county of this state, any person interested in the estate of the testator may contest such will or testament within the time, in the manner, and for any or all the causes prescribed by the laws of In-



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diana in cases of the contest of domestic wills: *Provided*, That nothing in this section shall be so construed as to allow the contest of any foreign will which may have been probated, or filed and recorded, in any county of this State, more than three years before the commencement of such contest."

It is first contended by appellee that said section 2770 (2600), *supra*, has no application to a case like the present when a copy of the foreign will and probate is filed and recorded in this State, citing *Harris v. Harris*, *supra*. If this contention of appellee is correct, then upon the authority of that case, this action brought by her must fail, for want of jurisdiction in the court below, because there is no statute authorizing it. But the case of *Harris v. Harris*, *supra*, cited by appellee, is not like this. In that case the estate in the county where the copy of the foreign will and probate was produced for filing and record was personal property, while the property upon which the foreign will operates in this case is real estate.

The rule as to personal property is that the law of the place where the testator is domiciled at the time of his death governs as to the capacity of the testator to make a will and as to the forms to be observed in its execution and revocation, and as to its validity in every respect. 1 Jarman on Wills, 1-4 and notes; Schouler on Wills, section 491; 3 Am. and Eng. Ency. of Law, 630, 632, 634. Such questions as to bequests of personal property being governed by the law of the domicile of the testator, they are adjudicated when the will is admitted to probate in such jurisdiction, and the same is conclusive. *Ryno v. Ryno*, 27 N. J. Eq. 522, 524; *Strong v. Perkins*, 3 N. H. 517; *Ives v. Salisbury*, 56 Vt. 565; *Lovett's Exrs. v. Mathews*, 24 Pa. St. 330; *London v. Wilmington, etc., R. R. Co.*, 88 N. C. 584; *Wilson v. Gaston*, 92 Pa. St. 207; *Vermont*

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*Baptist Convention v. Ladd's Estate*, 59 Vt. 5, 9 Atl. 1; *Jourden v. Meier*, 31 Mo. 40, 43; *Douglas v. Cooper*, 3 Mylne & Keen, 378, 381; Van Fleet's Collateral Attack, section 236, pp. 224, 225, section 585.

As to such property, the probate of the will in the state where the testator was domiciled at the time of his death is, under the constitution of the United States, entitled to full faith and credit in every other state, and it was so held in *Harris v. Harris*, *supra*; *Ives v. Salisbury*, *supra*.

But it is settled that title to and the disposition of real property, whether by deed, a last will, or otherwise, must be governed exclusively by the law of the country where it is situated. *Lucas v. Tucker*, 17 Ind. 41, 45; *Calloway v. Doe*, 1 Blackf. 372; *Kerr v. Moon*, 9 Wheaton, 565; 1 Jarman on Wills, 1-4.

The law where the land lies governs not only as to the forms to be observed in executing the will but as to the capacity or incapacity of the testator to make a will. Schouler on Wills, section 491; 3 Am. and Eng. Ency. of Law, 630, 632, 634, and cases cited.

Whether a will containing a devise of realty is revoked is governed, so far as such devise is concerned, by the law of the country where such real estate is situate. *Bloomer v. Bloomer*, 2 Bradf. (N. Y.) 339; 3 Am. and Eng. Ency. Law, 634, 635.

Title to land by devise can only be acquired when the will is duly proved and recorded according to the law of the state in which the land is situated. The probate of a will in one state gives no title to land devised situate in another state. *Lucas v. Tucker*, *supra*, p. 45; *McCormick v. Sullivan*, 10 Wheaton 192.

It is evident, therefore, that the probate of the will of Mrs. Winsor in the state of New York had no effect on the title of the real estate in Evansville devised to her husband. He could only acquire title thereto

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when the same was proved and recorded as required by the laws of this State. We think, therefore, that under section 2770 (2600), *supra*, when a foreign will devises real estate situate in this State, and a copy of the same and the probate thereof, duly authenticated, is presented under our statute for filing and recording, that any person mentioned in said section may contest such proceedings, and if the foreign will is also admitted to probate or filed and recorded, such person may contest the same, within the time prescribed by said section. So far as *Harris v. Harris*, *supra*, may be deemed to hold to the contrary as to a will devising real estate, the same is overruled. Such a contest if successful has no effect on said will or the probate thereof in the jurisdiction where probated, but only prevents the will operating on real estate in this State, and leaves it to be governed by our statute regulating the descent of real property.

Appellants insist that under the proviso to section 2770 (2600), *supra*, appellee, even if her amended complaint is otherwise sufficient, cannot successfully maintain this action because said amended complaint shows that said will was filed and recorded September 28, 1889, which is more than three years before September 28, 1895, when she commenced this action.

Appellee, who is an infant, by her next friend, contends that she is authorized by section 2771 (2601), *supra*, to commence said action at any time within two years after she arrives at the age of 21 years, and that, therefore, her complaint is not insufficient for the reason stated.

It is settled that unless an action to contest a will is commenced within the period fixed by statute that the same cannot be maintained. *Bartlett v. Manor*,

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*supra*, and cases cited; *Cochran v. Young*, 104 Pa. St. 333; *Luther v. Luther*, 122 Ill. 558, 13 N. E. 166.

The section, 2771 (2601), *supra*, relied upon by appellee, was in force at the time section 2770 (2600), *supra*, concerning the contest of foreign wills was passed. If the proviso had been omitted from said section 2770 (2600), *supra*, it would clearly have given infants the same time wherein to commence an action to contest a foreign will, filed and recorded under the provisions of sections 2761-2763 (2591-2593), *supra*, as is allowed by sections 2771 (2601), *supra*, for the contest of a domestic will. If the legislature had intended to give such right to infants the proviso to said section should have been omitted. The only effect of the proviso was to limit to three years the time within which all persons without exception could commence an action to contest a foreign will, as provided in said section. This was clearly the intent of the legislature, for it is what that body has said in plain words. It follows that section 2771 (2601), *supra*, does not apply to contests of foreign wills authorized by section 2770 (2600), *supra*. Appellee insist that section 297, Burns' R. S. 1894 (296, R. S. 1881), which was enacted in 1881, and provides that "Any person being under legal disabilities when the cause of action accrues, may bring his action within two years after the disability is removed," should be construed with said section 2770 (2600), *supra*. It is settled law in this State, however, that our statute authorizing the contest of wills creates a right that would not exist in its absence, and that the right given must be exercised within the time fixed by such statute, and that this right is not extended or limited by the general statute of limitations contained in the code of civil procedure. *Bartlett v. Manor*, *supra*, and authorities cited.

It is contended by appellee that the action of the

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Vanderburgh Circuit Court in ordering a copy of the will and probate thereof recorded and filed was without jurisdiction and void, for the reason that no petition was filed by any person interested in the will, nor did it appear that any property existed in the county on which the will would operate. A petition in such case would have been proper, but there is no statute requiring any petition to be filed in such a proceeding. Section 2773, Burns' R. S. 1894 (2593, R. S. 1881), concerning the filing and recording of foreign wills in this State, provides that a copy of the will and probate may be produced, by any person interested therein, to the circuit court of the county in which there is any real estate upon which the will may operate. The person interested in the will is not required to appear in person and produce the will, this may be done by his agent or attorney, as in other cases. The court assumed jurisdiction of the proceeding and made the order, and the copy of the will and probate was duly filed and recorded as required by statute.

When the jurisdiction of such a court depends upon the finding of certain facts, the exercise of jurisdiction implies the finding of such facts. *Jackson v. State*, 104 Ind. 516, 520; *Osborn v. Sutton*, 108 Ind. 443, 445; *Sims v. Gay*, 109 Ind. 501, 503; *Ney v. Swinney*, 36 Ind. 454, 457; *Thornton v. Baker*, 15 R. I. 553, 10 Atl. 618; *Wyatt's, Admr., v. Steele*, 26 Ala. 639, 650; *Florentine v. Barton*, 2 Wall. 210, 216. It was not necessary, therefore, that all the jurisdictional facts be set out in the order and judgment of the Vanderburgh Circuit Court, a court of general jurisdiction. The exercise of jurisdiction in said proceeding and making the final order and judgment therein implies the finding of the existence of all facts necessary to such jurisdiction. It follows that said judgment of the Vanderburgh Circuit Court rendered on

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September 24, 1889, is not therefore null and void, as claimed by appellee, but is in all respects valid.

It follows that the amended complaint does not state sufficient facts to constitute a cause of action. For the same reason the court erred in sustaining appellee's demurrer to appellant's answer.

The conclusion which we have reached renders it unnecessary for us to determine whether under the laws of this State the birth of legitimate issue to a married woman after she has made her will revokes such will.

Judgment reversed, as to all the appellants except Cornelia M. Winsor, William L. Winsor, Jr., and Annie M. Vanburen, who have filed a release of errors in this court, with instructions for further proceedings not inconsistent with this opinion.

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HUGHES ET AL. *v.* PARKER ET AL.

[No. 18,232. Filed November 17, 1897.]

148	692
148	706
149	520
150	63
148	692
157	605
148	692
158	537
148	692
162	455
148	692
168	67

**MUNICIPAL CORPORATIONS.—*Improvement of Street.—Preliminary Order.***—The preliminary order by resolution declaring a necessity for the improvement of a street, as provided by section 4289, Burns' R. S. 1894, is not essential to the jurisdiction of the common council of a city. *pp. 693, 694.*

**SAME.—*Foreclosure of Assessment Lien.—Indebtedness of City Beyond Constitutional Limit.***—In an action by a contractor against a property owner for the foreclosure of a street assessment lien, the question as to whether or not the city, at the date of entering into the contract for the improvement, was indebted beyond the constitutional limit, and did not have money in its treasury sufficient to pay its part of the cost thereof, cannot arise. *p. 694.*

**APPEAL.—*A Statutory Right.***—The right to an appeal being purely statutory, the legislature has the authority to make the decision of municipal officers final and conclusive. *p. 695.*

From the Hancock Circuit Court. *Affirmed.*

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Hughes *et al.* v. Parker *et al.*

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*S. A. Wray, R. A. Black, R. Williamson, E. Marsh and W. W. Cook, for appellants.*

*U. S. Jackson, E. W. Felt and Spencer & Binford, for appellees.*

HOWARD, J.—This was an action for the foreclosure of a street assessment lien. There was a finding of facts by the court, and judgment of foreclosure in favor of appellees, contractors for the improvement. Many errors are assigned by appellants. We shall consider those which are discussed by counsel.

It is first contended that the common council of the city of Greenfield never acquired jurisdiction of the subject-matter of the improvement or of the persons of the property owners assessed therefor, for the reason that no resolution of necessity was ever passed, or notice thereof given, as required by section 2 of the Barrett law (Acts 1889, p. 237), section 4289, Burns' R. S. 1894. It must be admitted that the proceedings of the council in this matter were irregular. The resolution of necessity should have been adopted, and notice thereof given as provided in the statute. But it has been repeatedly held that such resolution and notice are not essential to give jurisdiction to the council, provided only that notice and a hearing are given to the property owners before the making of the final assessments. This notice and hearing were had in the case at bar.

In the carefully considered case of *Barber Asphalt Paving Co. v. Edgerton*, 125 Ind. 455, it was said: "That where the whole subject of the matter of local improvements, and the assessments to be made in aid thereof, are conferred upon municipal corporations having charge of, and exclusive original jurisdiction over such improvements, as in this State, the proceed-

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*Hughes et al. v. Parker et al.*

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ings of such corporations will not be held void where there has been an attempt to comply with a statutory requirement, though such attempt does not amount to a strict compliance with the statute, if the corporation, in addition to its jurisdiction over the subject-matter, acquires jurisdiction over the persons to be affected." And again: "As to whether a particular improvement is, or is not necessary, must, of necessity, be left to the discretion of the common council of the city where the improvement is to be made. This question, we think, under the statutes in force in this State, may be determined by such council without notice to the property owner who is to be affected by such improvement." As to payment of assessments made for such improvements, however, it is said in the same connection, "the property owner is entitled to notice and a hearing;" and this notice and hearing, it is held, will satisfy the constitutional requirement. The decisions from other states, cited by counsel, are not controlling.

It is next contended that the action cannot be maintained for the reason that the city of Greenfield was, at the date of entering into the contract for this improvement, indebted beyond the constitutional limit, and did not then have money in its treasury sufficient to pay its part of the cost of the improvement. We are of opinion that the question thus suggested does not properly arise upon the record of this case. If the city of Greenfield, or one of its taxpayers as such, were here resisting the payment by the city of its proportion of the cost of the improvement, then what is said by counsel as to illegality of attempted increase of city indebtedness might be in point. But so far as concerns the payment by appellants of the assessment made against them for the improvement in front of their own property, it can make no difference



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whether the city pays for the street and alley crossings or not. The contractors are not here attempting to collect from the city, but from appellants. An error, to be available, must be harmful to the party complaining.

Counsel have also argued that the statute under which the improvement was made is unconstitutional, for the reason, as contended, that it provides for no appeal from the action of the council. In answer, it is to be said, in the first place, that, as a matter of fact, the statute does provide for an appeal, in which "all questions from the making of the contract to the report of the engineer on the final estimate are brought in review." Section 4298, Burns' R. S. 1894 (Acts 1891, p. 327); *Robinson v. City of Valparaiso*, 136 Ind. 616.

More than this, we may observe that the right to an appeal is and always has been statutory. Elliott's App. Proced., section 75, and following, and note to section 354. In the case before us, as said in *Sims v. Hines*, 121 Ind. 534, the legislature had "the authority to deny an appeal and to make the decision of the municipal officers final and conclusive."

Some minor questions are discussed by counsel, but we have found no available error in the record.

Judgment affirmed.

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SUTHERLIN v. THE STATE.

[No. 18,317. Filed November 17, 1897.]

148	695
100	695

**CRIMINAL LAW.—Indictment.—Repugnancy.—Murder.**—An indictment charging that defendant with a revolver and some other instrument, to the grand jurors unknown, both shot, cut, struck, and bruised deceased, thereby inflicting mortal wounds from which he instantly died, is not bad for repugnancy, and does not charge two offenses. *pp. 697, 698.*

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**INSTRUCTIONS.**—*Criminal Law.—Reasonable Doubt.—Statute Construed.*—There is no distinction in the application of the rule of reasonable doubt, as provided in section 1898, Burns' R. S. 1894, as to cases of positive or circumstantial evidence. pp. 698, 699.

**SAME.**—*Must be Considered Together.*—All of the instructions given in a cause must be considered together, and incomplete instructions may be completed and omissions therein supplied by subsequent instructions given. p. 699.

**SAME.**—*Inaccuracy of Language.—Criminal Law.*—A cause will not be reversed on appeal on account of the use of the word "murder," in an instruction to the jury defining the degrees of homicide, instead of the word "homicide" where no injury is shown to have resulted therefrom. pp. 699, 700.

**SAME.**—*Criminal Law.—Must be as to Law and not as to Facts.—Constitution Construed.*—Under the provision of section 19, article 1, of the constitution that "In all criminal cases whatever, the jury shall have the right to determine the law and the facts," the province of the court in the trial of a criminal cause is to advise the jury in matters of law only, and it is error to instruct upon the weight of the evidence or the ultimate conclusions from primary facts, or the evidence of such facts. pp. 700-704.

**SAME.**—*Erroneous Instruction not Cured by Contradictory Instruction.*—Where the court in the trial of a criminal cause instructed the jury as to the weight of the evidence and conclusions to be drawn from primary evidence, such error is not cured by the giving of another instruction, informing them that they were the exclusive judges of the law and the facts in the case. p. 704.

**SAME.**—*Erroneous Instruction.—When not Cured by Verdict.*—Where the court in the trial of a criminal cause by an instruction invaded the right of the accused to have submitted to the jury disputed questions of fact involving essential elements of his case, such error will not be held harmless on the ground that the verdict was right upon the evidence. p. 704.

From the Marshall Circuit Court. *Reversed.*

*E. C. Martindale and S. N. Stevens, for appellant.*

*W. A. Ketcham, Attorney-General, H. A. Steis, M. M. Hathaway, Harry Bernetha and Lauer & Glazelter, for State.*

**HACKNEY, J.**—The appellant was charged, in an indictment of three counts, with the offense of murder

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in the first degree. He was convicted, upon the second count, of murder in the second degree, and his punishment adjudged at imprisonment for life.

The second is the only count in the indictment the sufficiency of which is raised by the record, and it charged that at the county of Starke, on the 16th day of November, 1896, the appellant "did then and there unlawfully, feloniously, purposely and with premeditated malice, kill and murder one William E. B. Fetters, \* \* \* by then and there unlawfully, feloniously, purposely, and with premeditated malice, shooting at and against and thereby mortally wounding the said William E. B. Fetters \* \* \* with a certain deadly weapon, called a revolver, then and there loaded with gunpowder and leaden ball, which said revolver he, the said William Sutherlin, then and there had and held in his hands, and by then and there feloniously, purposely and with premeditated malice, cutting, bruising, striking, and thereby mortally wounding the said William E. B. Fetters, \* \* \* in some way and manner, and by some means, instruments, and weapons, to the grand jurors unknown, of which mortal wounds, inflicted in manner and form aforesaid, he, the said William E. B. Fetters," then and there instantly died.

It is earnestly contended that this count was bad for repugnancy in charging a killing by shooting, and also a killing by cutting, etc. With a fair comprehension of the scope of the charge it could not be objectionable for repugnancy, even if it were conceded that repugnancy is a ground for the quashing of an indictment. Stripped of its repetitions and merely descriptive elements, it charged that the appellant, with a revolver and some other instrument, both shot, cut, struck, and bruised Fetters, thereby inflicting mortal wounds from which he instantly died.

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It cannot be, with reason, and is not insisted, that a death from violence in both shooting and cutting involves two offenses. The position of counsel for appellant is that the charge is of two offenses, one in killing by shooting, and the other in killing by cutting and other means. When we have held, as we do, that the charge was that appellant inflicted two mortal wounds, one by shooting and one by cutting, etc., from which wounds death ensued, no ground remains for the question of repugnance.

Objection is raised to the court's instructions numbered ten, eleven, twelve, thirteen, fourteen, and eighteen, on the ground that they define "reasonable doubt" as applicable to cases of positive evidence rather than to one depending, as this does, upon circumstantial evidence. The argument in support of this objection is that by positive evidence all reasonable doubts of innocence must be removed, while with circumstantial evidence every reasonable hypothesis of innocence must be removed beyond a reasonable doubt.

Without stopping to inquire as to the possible existence of a distinction in the degrees of proof required in the two cases, it is necessary, in justice to the trial court, to say that the instructions mentioned are not criticised as proper definitions of the term "reasonable doubt" and of the requirement that, before a conviction may be had, the mind of each juror must be satisfied by such a degree of certainty that no reasonable doubt of guilt remains. Such instructions could only be beneficial to the defendant in a criminal cause, and they but state the rule of an express statute having no distinction as to cases of positive or circumstantial evidence. Section 1893, Burns' R. S. 1894 (1824, R. S. 1881).

That the instructions pointed out did not go so far

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as to include a statement of the rule that in circumstantial evidence it must, before conviction, exclude every reasonable hypothesis of innocence, and that merely to coincide with guilt is not the degree of proof required, is fully answered by the rule that all instructions must be considered together, and that the court in its twentieth and twenty-first charges instructed fully and clearly upon the very elements claimed to have been omitted from those first named.

The court's twenty-second charge is complained of as instructing that any unlawful killing of a human being was murder, and, therefore, did not include manslaughter. The charge directed the jury, that, if they found that Sutherlin had unlawfully killed Fetters, "it then becomes your duty to determine from the evidence whether the defendant is guilty of murder in the first or in the second degree or of manslaughter, and, in this connection, I instruct you that under an indictment for murder in the first degree, a person guilty of some grade of killing a human being may be convicted of murder in the second degree and also of manslaughter, according to the grade of offense shown by the evidence, and it is important in this connection that you should clearly understand what it is that constitutes these three degrees of crime which may be included in the offense called murder. Any unlawful killing of one human being by another is a murder of some kind, and different degrees of punishment are imposed upon conviction of the offender according to the degree and enormity of the offense." We think it manifest, not only from the language of the charge itself, but from others, in which the various grades of criminal homicide were defined and said to be included within the charge of murder in the first degree, that the word "murder" as employed in the last paragraph of the charge was intended, and could not have

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been understood otherwise than, as in its common and ordinary meaning, as implying an unlawful killing without regard to the technically defined grades of criminal offenses. In the paragraph preceding that in question, the statement of the court most clearly implies the use of the word in its common and broadest sense, for it is there said that the jury must understand what constitutes the three degrees of crime included in that called murder. At most, the word "murder," employed as it was, could have been but a slight verbal inaccuracy and not injurious. *Brown v. State*, 105 Ind. 385; *Stout v. State*, 90 Ind. 1.

The court's thirty-third instruction related to the contents of affidavits taken by the coroner, upon his inquest, and introduced in evidence in this case. The jury were told that they need not, and should not consider, as evidence, the parts of such affidavits made upon hearsay, rumor, or supposition, if there were such, but that they should consider only such statements as were within the actual knowledge of the deponents. Complaint is made that this charge is too general in not pointing out the evidence to be disregarded, and that it left the jury to perform that duty. It is not apparent that this charge was harmful to the appellant, nor does it occur to us to have violated any rule of law or practice. If the appellant had desired a more particular charge he should have asked it. If, instead of written evidence, it had been oral, we see no impropriety in directing the attention of the jury to the rule that evidence from knowledge, and not from rumor and the like, was alone to be accepted. We observe no plausible ground for complaint of this charge by the appellant, and his complaint is so meager as hardly to be classed as an argument.

The court's thirty-fourth charge was, in part, as follows: "*If, gentlemen, you find from the evidence that*

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*the human body found in the grave beneath the buried body of a mule was in fact the dead body of William E. B. Fetters, then you are justified in finding that a murder had been intentionally committed, and that the person or persons who undertook to conceal the body of Fetters, by burying it in this manner, were connected criminally in some manner with the murder.*

It follows that if you can determine from the facts and circumstances before you, as shown by the evidence, who were the persons, or who was the party that so buried the body of Fetters, you will be able to determine who the person or persons are who had taken part in the murder. William Sutherlin is charged in this case with being the man, or one of the men, who committed the murder, and this trial is for no other purpose than that of deciding whether this charge is true. It does not follow in the least that, because he is so charged, he is possibly, probably, or presumptively guilty." It then continues with general observations as to the purpose of the State to try only upon the evidence; of the duties of jurors to give their best thought to a consideration of the whole evidence, and to indulge in no mere guessing, the certainty required for conviction, and the duty to acquit where that certainty is not attained.

The parts of the charge objected to are those which are italicized, within the above quotation, and the objection urged is that they invaded the province of the jury in assuming and declaring the weight and probative force of, or inference deducible from certain circumstances proven.

The jury were plainly told that if the evidence proved that Fetters' body had been found buried beneath the body of a mule, then they were justified in finding that a murder had been intentionally committed. Not only this, but that the person who under-

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took to conceal Fetter's body, by so burying it, was connected criminally in some manner with the murder. The latter proposition is followed by a statement making it clear that the court intended to declare what inference might be drawn from the evidence. It was there said, that if the jury could determine who so buried Fetter's body, they would be able to determine also that such person took part in the murder. \*

The able counsel representing the appellee do not claim that the several inferences declared by the court were not inferences of fact, or that they were inferences of law, or law and fact. They were very clearly inferences of fact, and it is only necessary to inquire if, under the law, the court was authorized to draw them.

The constitution provides that "In all criminal cases whatever, the jury shall have the right to determine the law and the facts." Const. Art. 1, section 19. It has been frequently held that where there is testimony which has any legal effect in a cause, it would be error in the court to determine the weight of it, or the fact which it does or does not prove. *Myers v. State*, 121 Ind. 15; *Brooks v. State*, 90 Ind. 428; *Jackman v. State*, 71 Ind. 149; *Cunningham v. State*, 65 Ind. 377; *Snyder v. State*, 59 Ind. 105; *Field v. State*, 50 Ind. 15; *Barker v. State*, 48 Ind. 163; *Smathers v. State*, 46 Ind. 447.

In the recent case of *Newport v. State*, 140 Ind. 299, the rule is stated that "What evidence proves or tends to prove, after it has gone to the jury, is a question solely for the jury to decide, and it is error for the court to interfere with their decision upon the weight of the evidence, by instruction," citing a number of cases not cited above.

It is true, as counsel for the appellee contend, that the court had in other instructions charged the jury



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that they were the exclusive judges of the law and the facts in the case. Accepting the rule that all instructions must be considered together, it is further contended that no error existed in the thirty-fourth charge. In the case of *Newport v. State, supra*, it was said: "The objection urged against this instruction is that it invades the province of the jury and directs them as to what weight they shall give to certain evidence. They had already been instructed that they were the exclusive judges of the evidence, and its weight and force, and also of the law. But another instruction taking power away from them would not be cured by the former unless the latter was distinctively withdrawn. *Binns v. State*, 66 Ind. 428; *Kingen v. State*, 45 Ind. 518; *Bradley v. State*, 31 Ind. 492." See, also, *Howard v. State*, 50 Ind. 190; *Guetig v. State*, 63 Ind. 278. There is no claim that any instruction withdrew that objected to.

Counsel correctly say that the *Newport* case, *supra*, decided that to instruct the jury that they would be "justified" in a given conclusion from stated premises is but to instruct that the jury may so conclude, and is not a command that they should so conclude if the premises are found as stated. We are not able to discover the relief to be gained for the instruction in review by the holding referred to. The province of the court was to advise in matters of law only, and it here advised, not as to a legal inference, but as to an inference of fact. Can it be said that the jury accepted the instruction as upon a question of fact, and, because it invaded their province, declined to be controlled by it, or can we say that it was not accepted as a conclusion of law? We think not. Not that the jury may not have been able to make the nice discrimination between those propositions in instructions which may be inferences of fact, and those which may

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be conclusions of law, but the danger that they may not, illustrates the wisdom of denying to the court the privilege of instructing upon the weight of evidence or the ultimate conclusions from primary facts or the evidence of such facts.

But it is said that, although erroneous, it was harmless, because the verdict was right upon the evidence. Many decisions hold that an erroneous instruction will not require a reversal, unless, as some of the cases put it, it shall appear to have been prejudicial to the substantial rights of the complaining party; while other cases say it will be regarded as harmless if the record clearly discloses that the final result was right. The difference in the expressions of the rule may affect the burden of the issue, but with that we are not now concerned. The rule has its foundation upon the statute which provides that, "In the consideration of the questions which are presented upon an appeal, the supreme court shall not regard technical errors or defects or exceptions to any decision or action in the court below, which did not, in the opinion of the supreme court, prejudice the substantial rights of the defendant." Section 1964, Burns' R. S. 1894.

This statute has been invoked in many cases, some of which are: *Voght v. State*, 145 Ind. 12; *Reed v. State*, 141 Ind. 116; *Strong v. State*, 105 Ind. 1; *Brown v. State*, 105 Ind. 385; *Epps v. State*, 102 Ind. 539; *Stout v. State*, 96 Ind. 407; *Galvin v. State*, 93 Ind. 550. The cases do not establish a uniform rule from which to determine every case, and, it seems, that in any case the statute should be looked to for guidance.

In Elliott's App. Proced., section 631, it is declared that errors are not harmless where they relate to a primary or fundamental right, that affecting the cause of action rather than the mere procedure by which the cause is sought to be enforced. The statute in

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question renders harmless those errors, defects and exceptions which do not "prejudice the substantial rights of the defendant."

Is it, therefore, a substantial, primary or fundamental right of an accused to submit conflicting evidence of questions of fact, of direct and vital importance, to the jury, without an assumption of their province in this regard by the court? We think this question must be answered in the affirmative. If such questions are in dispute upon the evidence the trial court, in passing upon them, would usurp an exclusive function of the jury; and if this court, to support the trial court, should assume to adjust the conflict in the evidence, it would violate its own rule that it possesses no power to weigh and determine conflicts in the evidence, and would thereby repeat the error of the trial court.

If there were no conflict, or if the evidence related to some merely incidental or uninfluential or unimportant fact, another phase of the question would be presented.

In Elliott's App. Proced., *supra*, section 643, it is said: "Where the evidence is uncontradicted, or where the complaining party could not have prevailed, no matter what the instructions were given, the rule may be readily and easily applied, but where there is some, although apparently no very material conflict in the evidence, there is much difficulty in practically applying the general rule, inasmuch as in such cases there is danger of invading the province of the jury and usurping functions that do not belong to the court."

We conclude, therefore, that the constitutional right to submit disputed questions of fact, involving essential elements of the case, to the jury, is a sub-

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stantial right, and that when it is invaded by the trial court this court is given no right, by the statute, to hold such invasion harmless.

For the error suggested, judgment is reversed, with instructions to grant appellant's motion for a new trial.

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CORTRIGHT v. STATE, EX REL. ALEXANDER ET AL.

[No. 18,851. Filed October 28, 1897.]

From the Blackford Circuit Court. *Affirmed.*

*Jay A. Hindman*, for appellant.

*John A. Bonham*, for appellees.

JORDAN, J.—Appellant is a township trustee of Blackford county, Indiana, and relators are also trustees of that county. He refused to meet with them on the first Monday in June, 1897, for the purpose of appointing a county superintendent, and a peremptory writ of mandate was awarded by the court requiring him to meet with the relators on the 23d day of June, 1897, for the aforesaid purpose.

The same facts and questions as were involved in *Wampler v. State, ex rel.*, ante, 557, are presented by this appeal. On the authority of the decision in that case, the contention of counsel for appellant herein cannot be sustained, and the judgment of the lower court is therefore affirmed.

The same order as was made in the cause of *Wampler v. State, ex rel.*, supra, is directed to be entered in this cause, and the clerk of this court will certify accordingly.

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HART ET AL. v. PARKER ET AL.

From the Hancock Circuit Court. *Affirmed.*

*S. A. Wray, R. A. Black, R. Williamson, E. Marsh and W. W. Cook*, for appellants.

*U. S. Jackson, E. W. Felt and Spencer & Binford*, for appellees.

HOWARD, J.—The questions for consideration in this case are the same as those decided in *Hughes et al. v. Parker et al.*, ante, 692. On the authority of that case the judgment in this case is affirmed.

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*Madden v. State*, 183; *Shea v. City of Muncie*, 14.

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31. *Weight of Evidence.—Sufficiency of Evidence.*—The weight of the evidence is for the trial court, but its sufficiency to sustain the findings of the trial court may be considered on appeal.

*Habbe v. Viele*, 116.

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*Pfau, Treas., etc., v. State, ex rel. Ketcham, etc.*, 539.

33. *Record.—Affidavit.—Presumption.*—Where the record discloses that an affidavit was filed in response to a motion made by an adverse party to strike from the files an answer filed by such party, and such affidavit is not brought into the record, it will be presumed on



- appeal that the facts stated in such affidavit supported the ruling made by the court on such motion. *Working v. Garn et al.*, 546.
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*Breyfogle et al. v. Stotsenburg, Tr.*, 552.

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As to joint assignment, see APPEAL AND ERROR, 11; *Earhart et al. v. Farmers' Creamery et al.*, 79.

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*Mitchell v. St. Mary et al.*, 111.

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**BRIEF**—Rule of Supreme Court requiring brief to be filed before the expiration of sixty days from date of submission is mandatory, see APPEAL AND ERROR, 42; *Leatherman et al. v. Board, etc.*, 282.

**CARRIERS—**

1. *Common Carriers May Contract as Private Carriers.—Exemption From Liability for Negligence by Contract.*—Railway companies may contract as private carriers in transporting express matter for express companies, and in such capacity may require exemption from liability for negligence as a condition to the obligation to carry. *Pittsburgh, etc., R. W. Co. v. Mahoney, Admr.*, 196.

2. *Injury to Passenger.—Contributory Negligence.*—A passenger on a railroad train, in the night time, desiring to get off at a certain crossing where the train usually stopped, was informed by the conductor that he could get off, and was directed by the conductor to go upon the platform of the car when the train reached a certain point, and be ready to get off when the train arrived at the crossing. The passenger not only went upon the platform, but, while the train was going twelve or fifteen miles an hour, and at a point 1,600 feet from the crossing, went upon the lower step of the car, and, by a sudden jerk of the train, was thrown from the car and injured. *Held*, that the passenger was guilty of contributory negligence which precluded recovery.

*Cincinnati, etc., R. W. Co. v. McLain*, 188.

**COLLATERAL ATTACK**—Of a decree in partition, see PARTITION, 2; *Irvin v. Buckles*, 389.

Motion to set aside a judgment entered on the report of drainage commissioners on the ground that no notice was given the moving parties, see JUDGMENT, 4; *Long et al. v. Ruch et al.*, 74.

A proceeding to enjoin the collection of a judgment is a collateral attack on such judgment, see INJUNCTION, 8; *Davis, Sheriff, v. Clements*, 605.

**COMPLAINT**—See PLEADING.

Sufficiency of to review a judgment, see JUDGMENTS, 5; *Findling et al. v. Lewis et al.*, 429.

Sufficiency of in an action to enjoin the enforcement of a judgment, see PLEADING, 5; *Davis, Sheriff, v. Clements*, 605.

Sufficiency of in an action to enjoin the laying of conduits beneath a sidewalk, see INJUNCTION, 5; *Erwin v. Central Union Tel. Co. et al.*, 365.

Sufficiency of in a suit to enjoin county auditor from selling, for construction, an allotment on a ditch, see DRAINS, 6; *Cooper et al. v. Ray, Aud.*, 328.

By wife to enjoin enforcement of judgment and decree of foreclosure of her husband's real estate, and directing the disposition of the proceeds of sale after the satisfaction thereof, see JUDGMENTS, 2, 8; *Davis, Sheriff, v. Clements*, 605.

Sufficiency of in an action for personal injuries against a railroad company based upon the negligence of the company in violating the statute requiring trains to stop at the crossing of another railroad, see PLEADING, 6; *Cleveland, etc., R. W. Co. v. Gray*, 266.

Necessary allegations as to diligence in order to bind an endorser in blank, see BILLS AND NOTES, 1; *Mitchell v. St. Mary et al.*, 111.

As to supplemental complaint, see PLEADING, 10; *Ellis v. City of Indianapolis et al.*, 70.

1. *Contributory Negligence*.—*Knowledge of Danger*.—Averments in a complaint for personal injury, based upon the negligence of defendant, which show that plaintiff had some knowledge of danger, while important as tending to prove contributory negligence, will not so negative a direct averment therein that he was without fault as to preclude a recovery.

*Citizens' Street R. R. Co. et al. v. Sutton*, 169.

2. *Contributory Negligence*.—*Necessary Negative Averments*.—In an action for personal injuries based upon the negligence of defendant, an allegation in the complaint that such injuries were sustained without any fault or negligence of defendant sufficiently negatives contributory negligence on the part of plaintiff, unless it clearly appears from the facts specifically alleged that plaintiff was guilty of negligence which contributed to his injury. *Ib.*

**CONFESSION**—Admission of on trial of accused, see EVIDENCE, 4; *Hauk v. State*, 238.

**CONSIDERATION**—Pre-existing debt as consideration for conveyance of land, see DEEDS; *Adams et al. v. Vanderbeck et al.*, 92.

**CONSTITUTIONAL LAW**—Right of suffrage not given by the federal constitution, but by the state, see ELECTIONS, 6; *Gougar v. Timberlake et al.*, 38.

The right of suffrage is not given by the state constitution, see ELECTIONS, 8; *Ib.*

"Moore Law," giving cities power to prohibit sales of intoxicating liquor in residence portion, is constitutional, see INTOXICATING LIQUORS, 1, 2; *Shea v. City of Muncie*, 14.

1. *Amendments*.—The Supreme Court will not inquire into alleged irregularities in the passage of an act amending the constitution, where it was duly authenticated by the proper officers of each house as having been agreed to by both houses.

*Board, etc., v. Reeves et al.*, 467.

2. Section 6, article 2, of the state constitution declaring persons elected to office disqualified from holding same by offering a bribe or reward to secure his election is self-executing and needs no legislative enactment to carry it into effect and operation.

*Carroll v. Green*, 362.

**CONTRACTS**—A corporation is not bound by a contract entered into by its promoters, see CORPORATIONS, 1; *Smith v. Parker*, 127.

The mere fact that a contract is made between two corporations having common directors does not render the contract fraudulent or void, see CORPORATIONS, 5; *Smith, Tr., et al. v. Wells Mfg. Co. et al.*, 333.

Stockholder of corporation cannot maintain an action against a third person for a breach of contract with the corporation, see CORPORATIONS, 6; *Smith v. Parker*, 127.

1. *Statute of Frauds*.—Where, as a part of the consideration for the sale and transfer of a one-half interest in partnership property, the purchaser agreed to pay the indebtedness of the firm, and to pay the retiring partner one-half of the amount of a judgment against the firm if it is reversed on appeal, it is not in either of its aspects a contract to answer for the debt, default, or miscarriage of another within the statute of frauds.

*Dickson v. Conde et al.*, 279.

2. *Construction*.—*Provision Following the Signatures of the Contracting Parties*.—A provision immediately following the signatures of the parties to a written contract is to be construed as a part of the contract, though such provision is not signed, where the words "This agreement is further continued below," appear just above the signatures of the contracting parties. *Ib.*

**CONTRIBUTORY NEGLIGENCE**—One who attempts to cross an electric street railway track without looking and listening is guilty of contributory negligence, see STREET RAILROADS, 1, 2, 3; *Young v. Citizens' Street R. R. Co.*, 54.

Of passenger in alighting from train, see CARRIERS, 2; *Cincinnati, etc., R. W. Co. v. McLain*, 188.

When averments in complaint showing that plaintiff had some knowledge of danger will not negative a direct averment therein that he was without fault, see COMPLAINT, 1; *Citizens' Street R. R. Co. et al. v. Sutton*, 169.

Necessary negative averments as to, see COMPLAINT, 2; *Ib.*

*Railroad Crossing*.—Where a person, attempting to cross several railroad tracks, saw a train coming, and turning back to avoid such train, saw a train coming from the opposite direction on another track which she thought she could pass over before it would reach her, and was struck by such latter train, and was injured, she was guilty of such negligence contributing to her injury in attempting to cross said last track, as to preclude a recovery.

*Sutherland v. Cleveland, etc., R. R. Co.*, 308.

**CORPORATIONS**—May prefer creditors by executing mortgage or other lien upon its property, see MORTGAGES, 5; *Smith, Tr., et al. v. Wells Mfg. Co. et al.*, 333.

Action for a corporation cannot be maintained in name of officer who is a mere agent, see PLEADING, 3; *Mitchell v. St. Mary et al.*, 111.

1. *Contract Entered Into by Promoters.*—A corporation is not bound by a contract entered into by its promoters, unless, after its organization, it adopts such contract. *Smith v. Parker*, 127.
2. *Authority of President When Acting as Agent.*—Where a mortgage of a corporation is being attacked by other creditors of the mortgagor as fraudulent, instructions by three of the five directors of such corporation to the president, authorizes him to release the mortgage, under an agreement with the other creditors that they will grant an extension of time to the mortgagor. *Smith, Tr., et al. v. Wells Mfg. Co. et al.*, 333.
3. *Release of Mortgage.—Ratification by Trustee.*—A release of a mortgage to a corporation is ratified where a trustee of the corporation appointed by the stockholders, with full authority to close up its business, takes a new mortgage to secure the notes, and brings suit thereon. *Ib.*
4. *Directors Cannot Repudiate an Act of the Stockholders.*—The board of directors of a private corporation possess no authority to repudiate any act done by the authority of the stockholders. *Ib.*
5. *Contract.—Fraud.*—The mere fact that a contract is made between two corporations having common directors does not render the contract fraudulent or void. *Ib.*
6. *Stockholder.—Breach of Contract.*—A stockholder of a corporation cannot maintain an action against a third party for a breach of contract with the corporation. *Smith v. Parker*, 127.

**COSTS**—Upon the dismissal of a petition for drainage, see DRAINS, 8; *Thompson et al. v. Board, etc., et al.*, 136.

An assignment of error calling in question the decision of the trial court as to costs, presents no question on appeal, where there was no motion in the trial court to modify or correct the judgment, see APPEAL AND ERROR, 10; *Baldwin v. Sutton et al.*, 591.

#### COUNTIES—

1. *Treasurer.—Employment of Counsel.*—A county is not required to employ or pay counsel to defend its treasurer in an action brought to enjoin the payment of a warrant issued by the county auditor. *Barr, Aud., v. State, ex rel. Reading*, 424.
2. *Appointment of Attorney by Superior Court.—Statute Construed.*—It is not within the power of a superior court, under section 1481, Burns' R. S. 1894 (1415, R. S. 1881), authorizing the courts of record to allow sums to persons performing services under the orders of the court, to bind the county to pay for the services of an attorney appointed by such court to defend an action brought in the circuit court of the same county to test the constitutionality of the law creating the superior court. *Ib.*

**COUNTY COMMISSIONERS**—Cannot set aside or modify a final order or judgment, see PRACTICE, 7; *Town of Hardinsburg et al. v. Cravens*, 1.

*Appeal From.*—Appeals from a board of county commissioners to the circuit court stand for trial *de novo*, and suspend all proceedings had upon the questions in issue before the commissioners, which proceedings cannot be taken into consideration upon the trial in the circuit court. *Head et al. v. Doehleman*, 145.

**COUNTY SUPERINTENDENT—**

1. *Courts Judicially Know the Time for Electing.*—Courts judicially know the proper biennial year in which the township trustees of each county in the State are required to meet and elect successors to county superintendents then in office.

*Wampler v. State, ex rel. Alexander et al., 557.*

2. *Time for Election of by Township Trustee.—Statute Construed.*—The provision of section 5900, Burns' R. S. 1894 (4424, R. S. 1881), that township trustees shall meet biennially on the first Monday in June and appoint a county superintendent, is directory merely, and a failure to get a quorum on that day does not prevent a meeting for that purpose on a subsequent day. *Ib.*

3. *Mandamus May be Invoked to Compel Attendance of Absent Trustee at Meeting to Elect Superintendent.*—Where a township trustee fails to meet with the other trustees for the purpose of electing a county superintendent on the day provided by statute, and such other trustees for lack of a quorum have adjourned from day to day, mandamus may be invoked to compel such absent trustee to perform his official duty by attending the meeting. *Ib.*

**COUNTY TREASURER**—Collection of unpaid taxes charged to treasurer in his accounting, see **TAXATION**, 1; *State, ex rel. Riley, v. Taggart, Aud., et al., 431.*

**COURTS**—The presumption is that the circuit court had jurisdiction of the parties to a judgment, until the contrary is made to appear, see **JURISDICTION**, 1; *Long et al. v. Ruch et al., 74.*

*Discretion as to Amendment of Pleadings.*—The trial court has a wide discretion in the matter of amendments to pleadings, and unless it clearly appears that there was an abuse of discretion the Supreme Court will not interfere. *Burnett v. Milnes et al., 230.*

**CRIMINAL LAW**—A change of venue in a criminal action not punishable by death is left to the sound discretion of the trial court, see **VENUE**, 2; *Hauk v. State, 238.*

The court has the right to order a special venire to serve as jurors in the trial of a criminal cause, see **JURY**; *Ib.*

Where public offense is committed partly in one county and partly in another, see **JURISDICTION**, 2; *Ib.*

State not required to elect on which count of an indictment it will ask for conviction, where court withdraws all counts but one, see **TRIAL**, 1; *Ib.*

As to the admission in evidence of a confession on the trial of the accused, see **INSTRUCTIONS**, 12, 13, 14; *Ib.*

As to proof of commission of other like offenses, see **EVIDENCE**, 6; *Crum et al. v. State, 401.*

Instructions as to the rule of reasonable doubt, see **INSTRUCTIONS**, 10, 11; *Sutherland v. State, 695.*

Instructions must be as to law, and not as to the weight of the evidence, see **INSTRUCTIONS**, 7; *Ib.*

Having in possession gill net, or seine, see **STATUTORY CONSTRUCTION**, 5, 6; *Lewis v. State, 346.*

1. *Affidavit and Information.—Time of Commission of Offense.—Statute Construed.*—Section 1807, Burns' R. S. 1894 (1738, R. S.

1881), which provides that "the precise time of the commission of an offense need not be stated in the indictment or information, but it is sufficient if it be shown to have been within the statute of limitations," etc., is in aid of a liberal construction of criminal pleading, and, while not requiring a statement of the time of the commission of the offense, it renders sufficient a statement which may not be precise.

*Shell v. State, 50.*

2. *Affidavit and Information.—Time of Commission of Offense.—Statute Construed.*—Under the provision of section 1825, Burns' R. S. 1894 (1756, R. S. 1881), the failure to state in an affidavit and information the time at which the offense was committed, or the imperfect statement thereof, is not fatal where time is not of the essence of the offense. *Ib.*
3. *Indictment.*—An indictment must state by direct averments facts constituting the offense as defined by statute, and such a degree of certainty must be shown by its averments as to fully inform the accused of the charge preferred, and the court and jury of the crime of which, upon the trial, he is to be convicted or acquitted. *State v. Feagans, 621.*
4. *Indictment.—Repugnancy.—Murder.*—An indictment charging that defendant with a revolver and some other instrument, to the grand jurors unknown, both shot, cut, struck, and bruised deceased, thereby inflicting mortal wounds from which he instantly died, is not bad for repugnancy, and does not charge two offenses. *Sutherland v. State, 695.*
5. *Indictment.—Duplicity.*—Where a statute makes it a crime to do any one of several things mentioned disjunctively, all of which are punishable alike, the whole may be charged conjunctively in a single count without objection for duplicity. *State v. Fidler, 221.*
6. *Bribery.—Elections.—Indictment.—Sufficiency.—Consideration Given Elector.*—An indictment, under section 2329, Burns' R. S. 1894, for bribing an elector, which charges the giving and offer to give "two dollars," sufficiently describes the consideration or influence put forth, as the value thereof does not determine the degree of punishment. *State v. Downs, 324.*
7. *Bribery.—Elections.—Indictment.—Sufficiency.*—An indictment for bribery under section 2329, Burns' R. S. 1894, need not charge that the elector would have voted differently without the bribe, as the gist of such offense is the giving or offering of an article of value to influence the vote of an elector. *Ib.*
8. *Bribery.—Elections.—Indictment.*—An indictment which charges the giving, or offering to give a thing of value to induce an elector to vote the Republican ticket is sufficient under section 2329, Burns' R. S. 1894, as there is no distinction between the voting of a ticket and the voting for a candidate. *Ib.*
9. *Use of Stenographer Before Grand Jury.—When Will Not Abate an Indictment.*—The presence of a stenographer in the grand jury room, at the request of the prosecuting attorney, and the taking down in shorthand for the use of the prosecution, the evidence upon which an indictment was returned, is not sufficient to abate the indictment, without some showing that the accused was injuriously affected thereby. *State v. Bates et al., 610.*
10. *Officer Interested in Public Contract.—Indictment.—Statute Construed.*—An indictment under section 2136, Burns' R. S. 1894, which charges that defendant, while councilman, became interested as joint subcontractor, in the improvement of certain streets in such city without showing that the street improvement had been let to



any person, or that defendant entered into or became interested in any manner, in any contract with the city, is not applicable to such statute, and fails to charge a public offense.

*State v. Feagans, 621.*

11. *Larceny.—Indictment.—Description of Articles Stolen.*—Failure to sufficiently describe part of the articles alleged to have been stolen will not render an indictment bad where additional articles sufficient to constitute a public offense, if those questioned were omitted, were properly charged in such indictment.

*Edson v. State, 233.*

12. *Larceny.—Ownership of Property.—Proof.—Variance.—Statute Construed.*—Where an indictment charges the stealing of the property of V, and the evidence shows that it was in his possession as bailee, there is no variance or failure of proof, under the provision of section 1822, Burns' R. S. 1894 (1753, R. S. 1881), that when any offense is committed in relation to property which, when the offense was committed, was in the possession of a bailee, the indictment may allege the ownership to be in either the bailee or bailor. *Ib.*

13. *Plea in Abatement.—Objection to Grand Jurors.*—No error was committed by the trial court in sustaining a demurrer to a plea in abatement, interposed by defendant in a criminal cause, on the grounds that the grand jurors who returned the indictment were prejudiced against defendant, such plea giving as an excuse for not interposing such objection by challenge before the grand jury was sworn as provided by section 1752, Burns' R. S. 1894 (1656, R. S. 1881), that at the time the grand jury was in session and when the indictment was returned defendant was in jail and had no opportunity to challenge said grand jury, where it is not shown that defendant was in jail at the time the grand jury was sworn or impaneled, or that he attempted in any way to avail himself of his right of challenge at the proper time. *Hauk v. State, 238.*

14. *Evidence.—Larceny.*—A charge of theft in stealing several articles is not defeated if the proof show the stealing of but few of such articles. *Edson v. State, 233.*

15. *Possession of Stolen Goods.—Evidence.*—When it is proven that property has been stolen, and the same property, recently after the larceny, is found in the exclusive possession of another, the law imposes upon such person the burden of accounting for his possession, and of showing that such possession was innocently acquired; and if he fails so to account satisfactorily for such possession, or gives a false account, the presumption arises that he is the thief. *Johnson v. State, 522.*

16. *Possession of Stolen Property.—Evidence.*—Where the identity of property described in an indictment for larceny is in dispute, evidence is admissible to show that the defendant, at the time of his arrest, had in his possession other stolen property. *Ib.*

17. *Larceny.—Obtaining Money by Trick or Deception.*—One who obtains from another the possession of money, representing that he has an agency through which he can obtain five dollars for one which would pass anywhere, and agrees to make such person his partner in the scheme and either return the money so obtained or give to him such counterfeit money of five times the amount obtained, and immediately appropriates the money to his own use, without any intention either to return it or give the counterfeit money, is guilty of larceny, and not of obtaining money by false pretenses. *Crum et al. v. State, 401.*

18. *Evidence Must Support the Conclusion of Guilt.*—It is the duty of the court, before sustaining a conviction for a crime, to find evidence

supporting the conclusion of guilt. It is not enough that evidence merely tends to support such conclusions. *Martin v. State*, 519.

19. **Disfranchisement.—Larceny.—Infamous Crime.—Statute Construed.**—The crime of larceny is an infamous crime within the meaning of section 8, article 2. of the state constitution, and disfranchisement for any determinate period may be imposed as part of the punishment for one convicted of such crime under the provision of section 2006, Burns' R. S. 1894 (1923, R. S. 1881).

*Crum et al. v. State*, 401.

20. **Instruction.—Abortion.—Statute Construed.**—In the trial of a person charged with procuring an abortion an instruction to the jury, that, if the abortion was procured as alleged in the indictment, the offense was complete without regard to the fact as to whether or not death resulted from such unlawful act, stated the law correctly, notwithstanding the indictment charged both miscarriage and death as the consequences of the criminal acts alleged, as either miscarriage or death completes the offense, under the provisions of section 1996, Burns' R. S. 1894 (1923, R. S. 1881). *Hauk v. State*, 238.

21. **Appeals.**—Appeals in criminal cases can only be taken from final judgments. *Erganbright v. State*, 180.

**CROSS-COMPLAINT**—Must be sufficient within itself, without aid from any other pleadings in the case, see PLEADING, 11; *Schmidt et al. v. Zahrdt*, 447.

**DAMAGES**—To abutting property owner by the obstruction of highway, see HIGHWAYS, 4; *Pittsburgh, etc., R. W. Co. v. Nofstger*, 101.

A judgment will not be reversed, on appeal, for failure to assess nominal damages, see APPEAL AND ERROR, 39; *Smith v. Parker*, 127.

**Basis of Action.—Refusal to Loan Money.—Measure of Damages.**—In contemplation of law money is always in the market and procurable at the lawful rate of interest, and the measure of damages for refusal to loan money pursuant to agreement is the difference between the interest agreed to be paid and what plaintiff was compelled to pay to borrow the money; and where no statement is made in the complaint of the rate of interest that defendant was to receive, and no statement of what the current rate of interest was, or what the money could have been procured for, no basis can be fixed for estimating or measuring the damages. *Ib.*

#### **DECEDENT'S ESTATES—**

**Appeal.—How Perfected.**—An appeal by the administrator of a decedent's estate cannot be prosecuted under the code governing appeals in general, but must be taken under the statute regulating the settlement of decedents' estates, sections 2609, 2610, Burns' R. S. 1894 (2454, 2455, R. S. 1881), which provide that the appeal bond shall be filed within ten days after the decision complained of is made, unless the time is extended by the court to which the appeal is taken, and that the transcript shall be filed in this court within thirty days after filing the bond.

*Bollenbacher et al. v. Whisnand, Admr.*, 377.

**DEDICATION**—As to intention of party in dedicating land to public use, see EVIDENCE, 11; *Pittsburgh, etc., R. W. Co. v. Nofstger*, 101.

#### **DEEDS—**

**Consideration.—Pre-existing Debt.**—A conveyance of land by a debtor, in payment and satisfaction of a precedent debt, makes the grantee

*bona fide* purchaser of the land as against prior equities acquired from the grantor, of which the grantee had no notice.

*Adams et al. v. Vanderbeck et al.*, 92.

**DESCENT AND DISTRIBUTION—**

*Widow's Share of Real Estate.—Mortgage.*—Where a widow's interest in the real estate of her deceased husband is sold and conveyed to pay her husband's debts secured by a mortgage thereon, she is entitled to be reimbursed for the full value of her share therein out of other assets of the estate, real or personal, if any, and such claim is preferred and must be paid before the claims of general creditors.

*Shobe, Admr., v. Brinson et al.*, 285.

**DISFRANCHISEMENT**—May be imposed as part of punishment for larceny, see **CRIMINAL LAW**, 19; *Crum et al. v. State*, 401.

**DRAINS**—Motion to set aside a judgment entered on the report of commissioners, on the ground that no notice was given the moving parties is a collateral attack, see **JUDGMENTS**, 4; *Long et al. v. Ruch et al.*, 74.

1. *Viewers.—Objections to.—When Waived.*—In a proceeding to construct a city drain, under section 3598, Burns' R. S. 1894 (Acts 1891, p. 304), the failure of an interested party to appear and object to the committee appointed to assess the benefits and damages until after the committee had reported the benefits and damages to the common council, and such petition had been docketed in the circuit court, constitutes a waiver of the right to object.

*City of Valparaiso v. Parker et al.*, 379.

2. *Sewerage.—Statute Construed.*—The word "drainage" as used in section 3598, Burns' R. S. 1894 (Acts 1891, p. 304), providing for the drainage of cities, includes sewerage. *Ib.*

3. *Sewerage.—Practice.—Statute Construed.*—When a petition for drainage is filed in the circuit court, under the provision of section 3598, Burns' R. S. 1894 (Acts 1891, p. 304), the only question to be tried is the amount of benefits or damages to the landowners outside the city limits, provided such issue is properly presented by remonstrance. *Ib.*

4. *Construction.—Order of Sale of Allotments.—Objection.*—Under the provision of section 5678, Burns' R. S. 1894, of the drainage law, that any job not completed within the time fixed in the final report of the viewers, shall be sold for construction by the auditor, but that he shall not sell any allotment until the section immediately below shall have been completed, only those whose allotments were sold before the section below was completed have any right to object to such sale. *Cooper v. Shaw et al.*, 313.

5. *Sale of Allotment, for Construction, by Auditor.—Presumption.*—Where a county auditor, pursuant to section 5678, Burns' R. S. 1894, proceeds to sell, for construction, an allotment on a ditch established by the board of county commissioners, it will be presumed that such auditor has discharged his duty in every way under the drainage law. *Cooper et al. v. Ray, Aud.*, 323.

6. *Sale of Allotment, for Construction, by Auditor.—Injunction.—Complaint.*—In an action to enjoin a county auditor from selling, for construction, an allotment on a ditch, on the ground that the section of the ditch immediately below has not been completed, the complaint must allege facts showing that such section has not been completed according to the specifications of the report upon which

the ditch was established; an allegation that the sections of the ditch below the allotment "have not been constructed and completed as the law required they should be," is a mere conclusion.

*Id.*

7. *Remonstrance.—Evidence.*—Where the aggregate benefits of a proposed drain, which benefits were unquestioned by anyone against whom they were assessed, exceeded the cost of the drain, evidence that collectively the lands affected were of no more value with than without the proposed drainage is inadmissible to sustain a remonstrance under the eighth cause specified in section 5625, Burns' R. S. 1894. *Earhart et al. v. Farmers' Creamery et al.*, 79.
8. *Report of Reviewers.—Dismissal of Petition.—Costs.—Statute Construed.*—Section 5694, Burns' R. S. 1894, of the drainage law, providing for a hearing of the second report of the viewers by the board of county commissioners, authorizes such board to hear and determine the report of the apportionment according to the evidence, and if the evidence shows that the costs exceed the benefits they are not bound to confirm the report, but are required to dismiss the petition and proceedings at the cost of the petitioners.  
*Thompson et al. v. Board, etc., et al.*, 136.
9. *Report of Commissioners.—New Trial.*—Objection to the report of drainage commissioners, because they did not properly describe the lands affected by a certain drain, must be remedied by motion addressed to the report, and cannot be reached by motion for new trial.  
*Earhart et al. v. Farmers' Creamery et al.*, 79.
10. *Remonstrance.*—One who fails to remonstrate against the construction of a drain, as provided by section 5625, Burns' R. S. 1894, is as much barred by the judgment as if he had remonstrated and been defeated.  
*Hoefgen v. Harness et al.*, 224.
11. *Change of Line by Agreement.—Objections.*—When the line of a ditch, established by the board of commissioners under sections 5655-5688, Burns' R. S. 1894, is changed on the lands of any one or more persons by agreement of the county surveyor, those owning land on the line of said ditch above where the change was made cannot successfully ask for equitable relief, unless the change in some way interferes with the drainage of their lands.  
*Cooper v. Shaw et al.*, 313.
12. *Assessment of Damages.—Intervening Petition by Landowner.—Statute Construed.*—An intervening petition, seeking an allowance for damages resulting from the construction of a drain, filed nearly three years after such drain had been established, and nearly two years after the drainage commissioner had reported that the drain was partially completed, is properly stricken from the files, under the provisions of section 5625, Burns' R. S. 1894, where it is shown that such petitioner was duly notified of the proceedings at the time the drain was established.  
*Hoefgen v. Harness*, 224.
13. *Appeal.—Statute Construed.*—In an appeal to the circuit court, under section 5695, Burns' R. S. 1894, from the action of the board of county commissioners in dismissing a drainage petition, only matters specified in said section can be assigned as error.  
*Thompson et al. v. Board, etc., et al.*, 136.

**ELECTIONS**—Sufficiency of indictment for bribery of elector, see

CRIMINAL LAW, 6, 7, 8; *State v. Downs*, 324.

Evidence of election officers as to the manner in which destroyed ballots were marked, not admissible in the trial of a contested election case, see EVIDENCE, 12; *Weakley v. Wolf*, 208.

1. *Board of Election Commissioners.*—The board of election commissioners is not a tribunal set up for the trial of any abuses that may occur in the nomination of candidates, but must print the tickets as certified to by the proper parties.  
*Board of Election Commissioners, etc., v. State, ex rel. Sides, 676.*
2. *Name of Candidate May Appear More than Once on Ballot.*—*Election Commissioners.*—*Mandate.*—*Statute Construed.*—Under the provision of sections 18 and 26 of the election law of 1889, as amended by the act of 1891, sections 6215, 6222, Burns' R. S. 1894, the board of election commissioners may be required by mandate to print on the official ballot, under the emblem of each party respectively, the names of candidates properly certified to them by two political parties as provided in such acts, notwithstanding the same list of candidates is certified by both political parties. *Ib.*
3. *City Officers.*—*General Elections.*—*Statute Construed.*—Under the provision of section 3476, Burns' R. S. 1894, general elections are held quadrennially, beginning on the first Tuesday in May, 1894, and the successor of a city treasurer elected at a special election after the incorporation of such city in 1894 could not be elected until the first Tuesday in May, 1898.  
*State, ex rel. Schrisler, v. Winter, 177.*
4. *Contests.*—*Municipal Elections.*—*Right of Appeal.*—*Statutes Construed.*—Construing section 6323, Burns' R. S. 1894 (4767, R. S. 1881), providing that all contests for municipal offices shall be tried in the manner provided by law for the contest of county and township offices, with section 644, Burns' R. S. 1894 (632, R. S. 1881), providing generally for appeals from the circuit courts to this court, an appeal will lie from the circuit court from contested municipal elections, notwithstanding no right of appeal is specially granted in such cases under the former statute.  
*Weakley v. Wolf, 208.*
5. *Ineligibility.*—*Bribery.*—*Evidence.*—*Constitution Construed.*—Under the provision of section 6, article 2, of the State constitution that "Every person shall be disqualified for holding office during the term for which he may have been elected, who shall have given or offered a bribe, threat or reward to secure his election," evidence that contestee offered to purchase the vote of witness at the general election at which he was a candidate was admissible in the trial of an election contest on the ground of ineligibility of contestee.  
*Carroll v. Green, 362.*
6. *Suffrage.*—*Constitutional Law.*—The right of suffrage is not given by the federal constitution but by the State.  
*Gougar v. Timberlake et al., 38.*
7. *Woman Suffrage.*—*Constitutional Law.*—The general rule of construction, that which is expressed makes that which is silent cease, applies to article 2, section 2, of the state constitution, which gives to male citizens in express terms the right to vote. *Ib.*
8. *Woman Suffrage.*—*Constitutional Law.*—The provision of article 2, section 2, of the state constitution that "in all elections not otherwise provided for by this constitution, every male citizen of the United States of the age of twenty-one years and upward \* \* \* shall be entitled to vote," is not a grant which merely limits or restricts the right to vote, but is a political privilege expressly granted to the class of persons therein specified, and which does not exist except as it is given by the constitution and written laws of the State. *Ib.*

**EVIDENCE**—Necessary to sustain a conviction for larceny, see **LARCENY**, 1; *Martin v. State, 519.*

- Must support conclusion of guilt, not merely tend to support such conclusion, see CRIMINAL LAW, 18; *Ib.*
- A charge of theft in stealing several articles is not defeated if the proof shows the stealing of but few of such articles, see CRIMINAL LAW, 14; *Edson v. State*, 283.
- When evidence of possession of stolen goods raises presumption of guilt, see CRIMINAL LAW, 15; *Johnson v. State*, 522.
- Where the identity of property described in an indictment for larceny is in dispute, evidence is admissible to show that defendant at the time of his arrest had in his possession other stolen property, see CRIMINAL LAW, 16; *Ib.*
- Sufficiency of in an action to reform a lease, see REFORMATION OF INSTRUMENTS; *Habbe v. Viele*, 116.
- Weight of, for trial court, but sufficiency may be considered on appeal, see APPEAL AND ERROR, 31; *Ib.*
- Withdrawal of improper evidence from the jury, see TRIAL, 2, 3, 5; *Madden v. State*, 183.
- Admission of, after submission of cause, see TRIAL, 4; *Working v. Garn et al.*, 546.
1. *Weight Of.*—This court will not weigh the evidence for the purpose of determining conflicts therein. *Ib.*
  2. *Weight Of.—Admission in Evidence of a Confession Made by Defendant.*—This court will not weigh the evidence given in the trial court upon the competency of the admission in evidence of a written confession made by defendant, or attempt to reconcile conflicts therein, where there is evidence introduced which well and fully supports the decision of the court. *Hauk v. State*, 238.
  3. *Order of Admission.—Criminal Law.—Abortion.*—In the trial of a person charged in procuring an abortion resulting in death, evidence by a physician who made a *post mortem* examination of the body of the deceased as to the manner in which the miscarriage was produced, properly preceded proof of the *corpus delicti*, as such evidence tended to prove the *corpus delicti*. *Ib.*
  4. *Confession.—Admission Of, on Trial of Accused.*—The question to be determined in the admission in evidence of a written confession made by the accused is whether there had been any threats made in obtaining such confession of such a nature as to cause defendant to state that which was false from fear of such threats. *Ib.*
  5. *Character of Witness.—Not Confined to Present Residence.*—The inquiry as to the reputation of a witness is not necessarily confined to his present residence, but may be traced back to his former residence where he had lived fifteen months before. *Ib.*
  6. *Proof of Commission of Other Like Offenses.—Criminal Law.—Larceny.*—Evidence of other similar offenses committed about the same time as the crime for which defendant is on trial is admissible in a prosecution for larceny by obtaining possession of money under promise to return it in a few days or give five times the amount in counterfeit money which could not be detected, without any intention either to return the money obtained or give the counterfeit money. *Crum et al. v. State*, 401.
  7. *Intention of Party.*—When the character of an act depends upon the intent with which it was done, the party may testify as to such intention. *Pittsburgh, etc., R. W. Co. v. Nofstger*, 101.

8. *Abortion.—Letter Written by Deceased Before the Commission of the Offense not Admissible.*—A letter written by deceased several days before an abortion was committed, resulting in her death, which tended to show that she herself had attempted to produce the miscarriage, was not admissible in evidence in the trial of a person charged with aiding in procuring such abortion. *Hauk v. State, 238.*
9. *Nonexpert.—Opinion.*—A nonexpert witness who has observed the condition of a person may express his opinion as to whether such person was sick or not, where it is impossible for such witness to present to the jury all of the facts upon which the opinion is based. *Cleveland, etc., R. W. Co. v. Gray, 266.*
10. *Competency of Physician to Testify as to Facts Obtained in His Professional Business.—Criminal Law.—Abortion.*—In the trial of a charge of abortion resulting in death, evidence by the physician who attended deceased, and who was present as her physician when the miscarriage occurred, as to what he discovered upon an examination of the patient during such attendance, is not prohibited by section 505, Burns' R. S. 1894. *Hauk v. State, 238.*
11. *Dedication of Land to Public Use.—Intention of Party.*—Where the declarations, acts, and conduct of a landowner are such as fairly and naturally lead to the conclusion that he intended to dedicate land to public use, and others have in good faith acted upon such acts and declarations, the fact that the landowner may have entertained a different intention from that manifested by his acts and declarations cannot prevail against the force of his conduct and acts upon which the public or those dealing with him have relied. *Pittsburgh, etc., R. W. Co. v. Nofstger, 201.*
12. *Election Contests.—Mutilated Ballots.—Statute Construed.*—Under the provision of section 6245, Burns' R. S. 1894, of the election law, that all disputed ballots shall be preserved and all the remaining ballots be destroyed by the election officers at the completion of the count, by totally destroying the same with fire, evidence by the election officers as to the manner in which the destroyed ballots were marked, and for whom they were counted is incompetent in the trial of a contested election case. *Weakley v. Wolf, 208.*
13. *As to Earning Capacity of Plaintiff as a Physician.—Damages.*—Evidence as to plaintiff's earning capacity as a physician is admissible in an action for personal injuries, as a means of enabling the jury to arrive at the proper measure of damages. *Cleveland, etc., R. W. Co. v. Gray, 266.*
14. *Harmless Error.*—In an action against a railroad company for personal injuries, the refusal of the trial court to admit in evidence an ordinance prohibiting trains from running faster than four miles an hour, was harmless error, where the plaintiff wholly failed to establish her own freedom from negligence contributing to her injury. *Sutherland v. Cleveland, etc., R. R. Co., 308.*
15. *Introduction of Pleading Filed by Adverse Party.*—A party who introduces in evidence a pleading filed by the adverse party, but subsequently withdrawn, may explain and rebut portions thereof which are unfavorable to him. *Cleveland, etc., R. W. Co. v. Gray, 266.*
16. *Admissibility.—Fraudulent Conveyances.*—In an action to set aside a conveyance as fraudulent, evidence supporting the right to exempt the property conveyed, at the time of the conveyance, repels the charge of fraud, and is admissible without a special plea setting up such right. *Isgrigg v. Pauley et al., 456.*

17. *Action to Set Aside Judgment. — Hearing by Court After Rendition of Judgment.*—Where in the trial of an action to set aside, for fraud, a judgment refusing to admit a will to probate, it is shown that, at the time the judgment refusing to admit the will to probate was rendered, the trial court was kept in ignorance of certain transactions now alleged to be fraudulent, evidence is not admissible to show that the court rendering the original judgment, and but a few days thereafter, and during the same term of court, called for more evidence, and, after being fully advised as to such transactions, permitted the judgment to stand.

*Burnett v. Milnes et al.*, 230.

18. *Whether or Not a Building Is Within the Corporate Limits of a City, a Question of Fact.*—A question propounded to a witness as to whether or not a saloon building is within the corporate limits of a city is not objectionable as calling for a conclusion.

*Shea v. City of Muncie*, 14.

**EXAMINATION OF PARTY**—Where an adverse party has not been notified, see PARTIES; *Working v. Garn et al.*, 546.

#### **EXECUTION SALES—**

*Sheriff's Certificate.*—A certificate of purchase, to lands sold at an execution sale, will not pass title to the real estate where no deed has been executed after the lapse of the year allowed for redemption.

*Hill et al. v. Swihart et al.*, 319.

#### **EXECUTORS AND ADMINISTRATORS—**

*Modification of Judgment.—Practice.*—An administrator cannot object to the judgment entered in favor of the widow upon her cross-complaint in a proceeding instituted by the administrator to sell the real estate to pay the debts of the decedent, where the modification proposed does not affect the finding of the court that the land was not subject to sale by him.

*Shobe, Admr., v. Brinson et al.*, 285.

**FRAUD**—A judgment procured by fraud may be attacked directly and set aside in a proceeding instituted for that purpose, see JUDGMENTS, 7; *Asbury v. Frisz*, 513.

When judgment refusing to admit a will to probate will be set aside for fraud, see JUDGMENTS, 6; *Burnett v. Milnes et al.*, 230.

When judgment declaring person of unsound mind will be set aside for fraud, see JUDGMENTS, 1; *Asbury v. Frisz*, 513.

*Representations Upon Which Action Can Be Predicated.*—Representations upon which an action for fraud can be predicated must be of alleged existing facts, and not upon promises to be performed.

*Smith v. Parker*, 127.

**FRAUDULENT CONVEYANCES**—Evidence supporting the right to exempt the property conveyed is admissible without special plea, see EVIDENCE, 16; *Isgrigg v. Pauley et al.*, 436.

1. *When Creditor Cannot Avail Himself of the Fraud of Debtor.*—A creditor cannot avail himself of a fraudulent conveyance by his debtor where all the property is conveyed to another who assumes the debt.

*Old National Bank, etc., v. Heckman et al.*, 490.

2. *When Property Conveyed is Exempt from Execution.*—A conveyance of real estate cannot be set aside by creditors of grantor as fraudulent which if retained would be within the debtor's right of exemption.

*Isgrigg v. Pauley et al.*, 436.



8. *Husband and Wife.—Tenants by Entireties.*—A conveyance of real estate by a husband and wife to a third person to be by him conveyed to such husband and his wife as tenants by entireties, is fraudulent and void as to the creditors of the husband if made without consideration, or if made for the purpose of hindering, cheating and delaying such creditors.

*Lewis et al. v. Stanley et al.*, 351.

4. *Husband of Grantor.—Good Faith Of.*—A deed cannot be set aside on the ground of lack of good faith on the part of grantor's husband.

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5. *Interest of Wife not a Subject of.*—The interest of the wife in the husband's real estate is not, as to the husband's creditors, the subject of fraudulent conveyance.

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**GRAND JURY**—Objection to by defendant must be made before grand jury is sworn, see **CRIMINAL LAW**, 13; *Hauk v. State*, 238.

May have evidence taken down by stenographer for use of prosecution, see **CRIMINAL LAW**, 9. *State v. Bates et al.*, 610.

**GRAVEL ROADS**—See **HIGHWAYS**.

1. *Tax Levy for.—Personal Notice.—Constitution Construed.*—The act of 1893, as amended by act of 1895 (Acts 1895, p. 143), providing for the levy of taxes on the taxable property of a township for the construction of free gravel roads without personal notice upon each taxpayer of such township, is not within the constitutional inhibition of taking property without due process of law.

*Board, etc., v. Reeves et al.*, 467.

2. *Lands Taken for.—Compensation to Owner.*—Parties whose lands will not be appropriated for the construction of a free gravel road under the provision of the act of 1893 as amended by the act of 1895 (Acts 1895, p. 143), cannot invoke the provision of the state constitution prohibiting the taking of property without compensation, to defeat the construction of such road.

*Ib.*

8. *Construction.—Irregularities.—Injunction.*—The act of 1893, as amended by act of March 7, 1895 (Acts 1895, p. 143), providing for the construction of free gravel roads, confers upon the board of county commissioners judicial power, and mere irregularities in proceedings before such board of commissioners in proceedings to establish a free gravel road will not furnish any ground for an injunction.

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4. *Bonds.—Not Debt of Township.—Constitution Construed.*—The debt created in the construction of free gravel roads under the provision of the act of 1893, as amended by act of 1895 (Acts 1895, p. 143), is not the debt of the township, and bonds issued for the payment therefor in a sum in excess of two per centum of the value of the taxable property within such township is not within the inhibition of article 18 of the constitution limiting the indebtedness of a political corporation to two per centum of the value of the taxable property therein.

*Ib.*

**HABEAS CORPUS**—The law requiring the court to make special finding of the facts and state the conclusions of law thereon does not apply to *habeas corpus* proceedings, see **SPECIAL FINDINGS**, 2; *Schleuter v. Canatsy et al.*, 384.

1. *Motion to Quash.*—The motion to quash a writ of *habeas corpus* admits the truth of the allegations in the writ the same as does a demurrer to a pleading.

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*Ib.*

**HABEAS CORPUS**—The law requiring the court to make special finding of the facts and state the conclusions of law thereon does not apply to *habeas corpus* proceedings, see **SPECIAL FINDINGS**, 2; *Schleuter v. Canatsy et al.*, 334.

1. *Motion to Quash.*—The motion to quash a writ of *habeas corpus* admits the truth of the allegations in the writ the same as does a demurrer to a pleading.

*Ib.*

2. *Motion to Quash*.—*Practice*.—Overruling a motion to quash a writ of *habeas corpus* tests the sufficiency of the application for such writ. *Ib.*

**HACK STANDS**—Railroad companies may make and enforce reasonable rules as to space occupied by hacks and omnibuses on depot grounds, see **RAILROADS**; *Lucas et al. v. Herbert et al.*, 64.

**HARMLESS ERROR**—Error in overruling demurrer to an answer is harmless where special finding follows the facts alleged in another answer, see **APPEAL AND ERROR**, 29; *Smith, Tr., et al. v. Wells Mfg. Co. et al.*, 333; *Mitchell v. St. Mary et al.*, 111.

*Practice*.—No error was committed in sustaining a demurrer to certain paragraphs of answer, where the same evidence could be and was given under a remaining paragraph of answer.

*Lucas et al. v. Herbert et al.*, 64.

**HIGHWAYS**—See **GRAVEL ROADS**; **STREETS**.

1. *Establishment Of*.—*Notice to Landowner*.—*Statute Construed*.—In a proceeding under section 8762, Burns' R. S. 1894 (5085, R. S. 1881), to ascertain, describe, and have entered of record, a public highway which has been used as such for twenty years or more, but not sufficiently described, the owner of real estate to be affected must be notified thereof, or the acts of the board of commissioners will be void. *Town of Hardinsburg et al. v. Cravens*, 1.

2. *Obstructions*.—*Damages to Abutting Owner*.—The owner of real estate abutting on a public highway cannot maintain an action for the obstruction of such highway unless some special injury, one not common to all who use the highway, has been sustained, where such abutting owner is not the owner in fee simple of any part of the highway. *Pittsburgh, etc., R. W. Co. v. Nofstger*, 101.

3. *Obstructions*.—*Damages to Abutting Owner*.—The damages recoverable by an abutting landowner against a railroad company for maintaining a switch in a highway must be confined to the land described in the complaint and cannot include damages to another tract of land belonging to plaintiff in close proximity to the land described. *Ib.*

4. *Obstructions*.—*Damages to Abutting Owner*.—*Special Damages*.—The obstruction of a public highway by a railroad switch in such manner as to materially interrupt an abutting property owner in his means of access to his property, is a special injury, different in kind from that suffered by the public generally, and entitles such abutting owner to maintain an action for damages for such obstruction, notwithstanding such abutting owner is not the owner in fee of any part of the highway. *Ib.*

**HUSBAND AND WIFE**—Wife of a co-tenant not a necessary party in a proceeding for the partition of real estate, see **PARTITION**, 3; *Haggerty v. Wagner*, 625.

A deed of a wife cannot be set aside on the ground of the lack of good faith on the part of her husband, see **FRAUDULENT CONVEYANCES**, 4; *Working v. Garn et al.*, 546.

The interest of the wife in the husband's real estate is not, as to the husband's creditors, the subject of fraudulent conveyance, see **FRAUDULENT CONVEYANCES**, 5; *Isgrigg v. Pauley et al.*, 436.

A conveyance of real estate by a husband and wife to a third person, to be by him conveyed to such husband and wife as tenants

by entireties, is fraudulent and void as to the creditors of the husband, see FRAUDULENT CONVEYANCES, 3; *Lewis et al. v. Stanley et al.*, 351.

1. *Advancements.—Equitable Lien of Wife on Real Estate of Husband.—Enforcement.*—Equity will not enforce a lien in favor of the wife on real estate of the husband while she holds real estate conveyed to her by the husband in lieu of such lien, although not accepted by her as such. *Ib.*
2. *Advancements.—Equity of Wife in Real Estate Purchased by.*—Equity will not enforce a lien in favor of the wife at the death of her husband to a one-half interest in real estate held by the husband, as against creditors, on account of money furnished by the wife's father as an advancement to her, and used in payment of one-half of the purchase-price of such real estate, where the deed to the real estate was made to the husband with the consent of the wife's father who made the advancement and paid same to the grantor after the deed was so made. *Ib.*

**INDICTMENT**—Description of articles stolen, see CRIMINAL LAW, 11; *Edson v. State*, 283.

For larceny may allege the ownership of the property stolen to be in either bailee or bailor, see CRIMINAL LAW, 12; *Ib.*

When the precise time of the commission of an offense need not be stated, see CRIMINAL LAW, 1, 2; *Shell v. State*, 50.

When not bad for repugnancy, or for charging two offenses, see CRIMINAL LAW, 4; *Sutherlin v. State*, 695.

When not bad for duplicity, see CRIMINAL LAW, 5; *State v. Fidler*, 221.

Against officer for being interested in public contract, see CRIMINAL LAW, 10; *State v. Feagans*, 621.

For bribing elector, see CRIMINAL LAW, 6, 7, 8; *State v. Downs*, 324.

*When not Bad for Duplicity.—Abortion.—Criminal Law.*—An indictment for abortion which charges both miscarriage and death is not bad for duplicity. *Hauk v. State*, 238.

**INDEMNIFYING MORTGAGES**—SEE MORTGAGES.

**INFAMOUS CRIME**—Larceny is an infamous crime within the meaning of section 8, article 2, of the constitution, see CRIMINAL LAW, 19; *Crum et al. v. State*, 401.

**INJUNCTION**—Sufficiency of complaint in a suit to enjoin county auditor from selling, for construction, an allotment on a ditch, see DRAINS, 6; *Cooper et al. v. Ray, Aud.*, 323.

When will be granted in favor of a property owner against the maintenance of a public market, see MUNICIPAL CORPORATIONS, 6; *City of Richmond et al. v. Smith*, 294.

To prevent the drilling of a natural gas well near a dwelling, see NATURAL GAS; *Windfall Mfg. Co. v. Patterson et al.*, 414.

Mere irregularity in the proceedings before the board of commissioners for the establishment of a free gravel road will not furnish ground for, see GRAVEL ROADS, 3; *Board, etc., v. Reeves et al.*, 467.

1. *By Member of Mutual Life Insurance Company to Prevent Payment of Invalid Claim.*—A policy holder in a mutual life

insurance association may maintain a suit to enjoin the association from paying an invalid claim, where it is shown that the association has accumulated, and is accumulating from the assessments collected from its members, a fund for the benefit of all policy holders, from which policies are paid at the death of the holders, and from which dividends are distributed to the policy holders, and added to their policies. *Carmien et al. v. Cornell et al.*, 83.

3. *To Prevent Officers of Mutual Insurance Company from Paying Invalid Claim.*—Where the officers of a mutual insurance company have accepted the proof of loss of a claim made by the beneficiary of an invalid policy, and are about to lay assessments upon the members for the purpose of paying said invalid claim, the members of the company have no adequate remedy at law, and are entitled to injunctive relief. *Ib.*
3. *Judgments.—Collateral Attack.*—A proceeding to enjoin the enforcement of a judgment or decree by execution, or decretal order is a collateral attack upon the judgment, and cannot be maintained for mere irregularities, but only by showing that the judgment or decree, or the part thereof, the enforcement of which is sought to be enjoined, is void. *Davis, Sheriff, v. Clements*, 606.
4. *Wrongful Appropriation of Land for Street.*—An injunction is the proper remedy where a town is proposing to wrongfully appropriate land for a street, under color of right, without assessment, and tender of compensation to the owner. *Town of Hardinsburg et al. v. Cravens*, 1.
5. *Use of Space Beneath Sidewalk.—Complaint.*—A complaint by an abutting landowner to enjoin the laying of conduits beneath the sidewalk, which does not allege that the plaintiff is the owner in fee of the soil to be invaded, is insufficient on demurrer. *Erwin v. Central Union Telephone Company et al.*, 365.
6. *Street Improvements.*—An action will not lie to enjoin the trustees of a town from making street improvements after the contract therefor has been entered into, where such trustees had jurisdiction to enter into the contract, as the statute under which such street improvements are made provides that in case a property owner refuses to pay his assessment, an appeal may be had in which all questions from the making of the contract to the report of the engineer on the final assessment are brought in review. *Everett et al. v. Deal et al.*, 90.

**INSTRUCTIONS**—As to presumption on appeal that instructions given were applicable to the evidence, see **APPEAL AND ERROR**, 36; *Adams et al. v. Vanderbeck et al.*, 92.

An instruction, in the trial of a person charged with producing an abortion, that the crime is complete if either miscarriage or death resulted from such unlawful act, states the law correctly, see **CRIMINAL LAW**, 20; *Hauk v. State*, 238.

1. *When Instruction is Incomplete.—Practice.*—Error cannot be predicated on the giving of an incomplete instruction where an additional or more definite instruction was not requested by the complaining party. *Crum et al. v. State*, 401.
2. *Inconsistent Instruction.*—Where two or more instructions are inconsistent and calculated to mislead the jury, or leave them in doubt as to the law, it is cause for reversal. *Pittsburgh, etc., R. W. Co. v. Noftsker*, 101.
3. *Erroneous Instruction.—How Cured.*—An erroneous instruction cannot be cured by giving an instruction excluding some of

the elements included in such erroneous instruction, but must be withdrawn from the jury. *Ib.*

4. *Inaccuracy of Language.—Criminal Law.*—A cause will not be reversed on appeal on account of the use of the word "murder," in an instruction to the jury defining the degrees of homicide, instead of the word "homicide" where no injury is shown to have resulted therefrom. *Sutherlin v. State, 696.*
5. *Erroneous Instruction.—When not Cured by Verdict.*—Where the court in the trial of a criminal cause by an instruction invaded the right of the accused to have submitted to the jury disputed questions of fact involving essential elements of his case, such error will not be held harmless on the ground that the verdict was right upon the evidence. *Ib.*
6. *Erroneous Instruction not Cured by Contradictory Instruction.*—Where the court in the trial of a criminal cause instructed the jury as to the weight of the evidence and conclusions to be drawn from primary evidence, such error is not cured by the giving of another instruction, informing them that they were the exclusive judges of the law and the facts in the case. *Ib.*
7. *Criminal Law.—Must be as to Law and not as to Facts.—Constitution Construed.*—Under the provision of section 19, article 1, of the constitution that "In all criminal cases whatever, the jury shall have the right to determine the law and the facts," the province of the court in the trial of a criminal cause is to advise the jury in matters of law only, and it is error to instruct upon the weight of the evidence or the ultimate conclusions from primary facts, or the evidence of such facts. *Ib.*
8. *Must be Considered Together.*—All of the instructions given in a cause must be considered together, and incomplete instructions may be completed and omissions therein supplied by subsequent instructions given. *Ib.*
9. *Naming of Circumstances to Be Considered.*—An instruction that the jury may consider certain enumerated circumstances which were proper for their consideration, but which does not tell them that they were bound to consider them, does not invade the province of the jury. *Shea v. City of Muncie, 14.*
10. *Criminal Law.—Reasonable Doubt.—Statute Construed.*—There is no distinction in the application of the rule of reasonable doubt, as provided in section 1898, Burns' R. S. 1894, as to cases of positive or circumstantial evidence. *Sutherlin v. State, 696.*
11. *Reasonable Doubt.—Not Applicable to Subsidiary Evidence.*—An instruction in the trial of a criminal cause, that "the doctrine of reasonable doubt, as a rule, has no application to mere matters of subsidiary evidence, taken item by item, but is applicable always to the constituent elements of the crime charged," states the law correctly, as it is to the material facts and not to the mere items of subsidiary evidence which may aid in proving the essential facts that the rule of reasonable doubt applies. *Hauk v. State, 238.*
12. *Evidence.—Confession.*—An instruction, that if the jury believed that a certain part of defendant's confession admitted in evidence in the trial of a criminal cause was false, then such confession might be disregarded entirely, was properly refused. *Ib.*
18. *Evidence.—Confession.—Competency of, a Question for the Court.*—Instructions seeking the submission to the jury of the competency of a written confession, made by defendant and admitted in evidence in the trial of a criminal cause, was properly refused for the reason that such question was a preliminary one to be determined

by the court, and such question having been settled and passed upon by the court in the admission in evidence of such confession, defendant was not entitled to have such question submitted to the jury for its decision. *Ib.*

14. *Evidence.—Confession.—Criminal Law.*—Where a written confession of defendant in the trial of a criminal cause was admitted in evidence, an instruction to the effect that such a confession was subject to mistakes that might arise from the misunderstanding of the meaning of the words used by the defendant, or by using words not used by the defendant, or by substituting the language of the person writing the confession for that of the defendant was properly refused as an invasion upon the province of the jury. *Ib.*
15. *Practice.—Statute Construed.*—Section 662, Burns' R. S. 1894 (650, R. S. 1881), dispensing with the necessity of bringing up the evidence on appeal upon the question of the correctness of instructions, makes no change in the practice as to instructions given, as the court, in the absence of the evidence, presumes that the instructions were applicable. *Adams et al. v. Vanderbeck et al.*, 92.
16. *Mortgage Given to Secure a Precedent Debt.*—An instruction in an action to quiet title to real estate that a mortgage taken to secure a precedent debt does not constitute the holder thereof a *bona fide* purchaser, states the law correctly. *Ib.*
17. *Highways.—Obstructions.—Damages to Abutting Owner.*—In an action against a railroad company by an abutting owner for maintaining a switch in a public highway, an instruction that the jury might "take into consideration the injury to the property, if any, naturally resulting from building the switch, in rendering the same inconvenient of access, if it was so rendered, or in any manner causing the same to be less suitable for use, together with the increased danger from fire emitted from the locomotives, and the decreased rental value of the property, together with all the facts proven which show a natural and necessary decrease in the value of the property," is erroneous where such abutting owner was not the owner in fee simple of any part of the highway. *Pittsburgh, etc., R. W. Co. v. Noftager*, 101.

#### **INSURANCE**—See MUTUAL LIFE INSURANCE.

A member of a mutual life insurance company may, by injunction, prevent the payment of an invalid claim, see INJUNCTION, 1, 2; *Carmien et al. v. Cornell et al.*, 83.

**INTENT**—When the character of an act depends upon the intent with which it is done, the party may testify as to such intention, see EVIDENCE, 7; *Pittsburgh, etc., R. W. Co. v. Noftager*, 101.

**INTERROGATORIES TO JURY**—When the failure of the court to require the jury to return more definite answers to certain interrogatories is not available error, see APPEAL AND ERROR, 85; *Wolf, Admr., v. Big Creek Stone Co.*, 317.

**INTOXICATING LIQUORS**—Action for violation of ordinance restricting sales to resident portion of city, see MUNICIPAL CORPORATIONS, 2; *Shea v. City of Muncie*, 14.

1. "*Moore Law.*"—Title of the Act Sufficiently Comprehensive.—The fact that the title of the act of March 9, 1895, fails to mention the subject of prohibiting sales in the residence portion of cities does not render the act unconstitutional under section 19, article 4, of the



- constitution, as it is not prohibition, but regulation of the traffic that the act provides for. *Ib.*
2. "*Moore Law*," *Not Local and Special Legislation*.—The act of March 9, 1895, known as the "*Moore Law*," amending clause 13 of section 3106, R. S. 1881, authorizing cities to pass ordinances prohibiting the sale of intoxicating liquors in the residence portion thereof, and confining the sale to the business portion, is not unconstitutional as being local and special legislation within the meaning of section 22, article 4, of the constitution. *Ib.*
  3. *Acts of March 9 and March 11, 1895, Not Repugnant*.—No such irreconcilable repugnance exists between the act of March 9, 1895, amending section 3106, R. S. 1881, authorizing cities to license, regulate and restrain the places where intoxicating liquors are kept for sale, and the act of March 11, 1895, which is a general act to better regulate and restrict the sale of intoxicating liquors, as to make the latter operate as an implied repeal of the former. *Ib.*
  4. *Construction of Act of March 9, 1895*.—"Residence Portion of City".—The "residence portion" of a city, within the meaning of clause 13 of section 3608, Thornton's R. S. 1897, does not necessarily mean a portion of the city given up exclusively to family residences. *Ib.*
  5. *Violation of Ordinance Restricting Sale to Residence Portion of City*.—*Former License as Defense*.—An ordinance prohibiting the sale of intoxicating liquors in the residence portion of a city, and providing that licenses previously issued shall be no defense to an action founded on the ordinance, is valid, and such license is not admissible as evidence in defense in a prosecution for a violation of the ordinance. *Ib.*
  6. *Ordinance Restricting Sale to Business Portion of City*.—An ordinance prohibiting the sale of intoxicating liquor in the residence portion of a city, and confining the sale thereof to the "business portion" of such city, under clause 13 of section 3608, Thornton's R. S. 1897, is not void for indefiniteness because the boundaries of the residence and business portions are not set forth therein. *Ib.*
  7. *Violation of Ordinance Restricting Sale*.—*Retention of Former License Fees*.—*Estoppel*.—Where an ordinance prohibits the sale of intoxicating liquors in the residence portion of a city, and provides that licenses previously issued shall be no defense in an action founded on the ordinance, the payment of the license fee to, and the retention thereof by the city do not estop the city from the enforcement of the ordinance. *Ib.*
  8. *County License*.—*Evidence*.—A license to sell intoxicating liquors issued by the board of county commissioners does not exempt the licensee from compliance with any lawful regulation by a city touching such sales conducted within the corporate limits thereof; and in a prosecution for a violation of an ordinance prohibiting the traffic in the residence portion of the city, the county license is not admissible as evidence. *Ib.*
  9. *Remonstrance*.—*Pleading*.—Since the only pleading authorized on behalf of the remonstrators against the granting of a license to sell intoxicating liquors is a remonstrance which must be filed with the board of county commissioners, it is not error to sustain a demurrer to an answer filed by the remonstrators after the case has been appealed to the circuit court. *Head et al. v. Doehleman, 145.*
  10. *Remonstrance*.—*Sufficiency Of*.—Under section 9, of the act of March 11, 1895, providing for a remonstrance against the granting of a license, by the board of county commissioners, to an applicant

for the sale of intoxicating liquors, it is not necessary that it be set forth in the body of the remonstrance that the remonstrators are legal voters, and constitute a majority of the legal voters of the township or ward as determined by the number of votes cast at the last preceding election. *Id.*

**JUDGMENT**—In an action to set aside a judgment, for fraud, evidence is not admissible to show that the court rendering the judgment, and but a few days thereafter, and during the same term of court, called for more evidence, and, after being fully advised as to such transactions permitted the judgment to stand, see **EVIDENCE**, 17; *Burnett v. Milnes et al.*, 230.

1. **Declaring a Person of Unsound Mind.—Setting Aside for Fraud.**—A judgment that a person is of unsound mind and incapable of managing his estate will be set aside as fraudulent where it is shown that the same was procured by falsely representing that the person alleged to be insane was confined in a hospital, and could not be produced in court without injury to his health. *Asbury v. Frisz*, 513.
2. **Complaint to Enjoin Enforcement Of.—Sufficiency.**—A complaint by the wife of a judgment debtor to enjoin the enforcement of a judgment and decree ordering the foreclosure of a mortgage and the sale of real estate of which her husband was the owner in fee simple, and directing that the proceeds of such sale, after the satisfaction of such mortgage, be applied to the payment of certain judgments, for the reason as alleged in her complaint that she was not made a party to any cross-complaint by any co-defendant in such proceeding, is insufficient where it is not alleged by whom the action in which such decree was rendered was begun, or that such part of the decree assailed was rendered upon a cross-complaint. *Davis, Sheriff, v. Clements*, 605.
3. **Presumptions as to Validity.—Complaint to Enjoin Enforcement Of.**—It will be presumed on appeal that a judgment rendered by a court of general jurisdiction is valid, and a complaint in an action to enjoin the enforcement thereof to be sufficient against a demurrer, must overcome or exclude such presumption. *Id.*
4. **Collateral Attack.—Drainage.**—Where a motion is made in a drainage proceeding to set aside a judgment entered on the report of the commissioners assessing benefits, on the ground that no notice was given the moving parties, such motion is a collateral attack on the judgment, and must set forth that the record discloses such want of notice. *Long et al. v. Ruch et al.*, 74.
5. **Review.—Complaint.**—A complaint to review a judgment should point out the error complained of, and set out the record to be reviewed, either by embodying same in the complaint, or by exhibit properly referred to and identified so as to become substantially a part of the complaint. *Findling et al. v. Lewis et al.*, 429.
6. **Setting Aside for Fraud.**—A judgment refusing to admit a will to probate will be set aside for fraud where the father of infant devisees, with the assistance of the attorney who wrote the will, satisfied the claims of all other persons interested, and then appeared in court as a contestant, and stated to the guardian *ad litem* for his minor children that it was an agreed case, and that all the parties were satisfied with the steps which were being taken, in reliance upon which such guardian filed only formal answer and gave no further attention to the case. *Burnett v. Milnes et al.*, 230.
7. **May be Attacked for Fraud by a Direct Proceeding.**—A judgment procured by fraud may be attacked directly, and set aside in a proceeding instituted for that purpose. *Asbury v. Frisz*, 513.

8. *Motion to Set Aside.*—*Court Not Legally in Session.*—The statement in a motion to set aside a judgment, that the court was not legally in session when the judgment was rendered, is a statement of a conclusion of law, and therefore unavailing.

*Long et al. v. Ruch et al.*, 74.

**JUDICIAL NOTICE**—Courts judicially know the proper biennial year in which to elect county superintendents of schools, see COUNTY SUPERINTENDENT, 1; *Wampler v. State, ex rel. Alexander et al.*, 557.

1. That which is judicially known need not be proven.

*State v. Downs*, 324.

2. *Elections.*—This court judicially knows that at the last general election one of the great political parties of this State and nation, known as the "Republican party," submitted to the voters of this State, a ticket known by the people and recognized in the election laws as the "Republican ticket." *Ib.*

**JURISDICTION**—Of circuit court in probating foreign wills, see WILLS, 10; *Evansville, etc., et al. v. Winsor, by Next Friend*, 632.

1. *Circuit Court.*—*Presumption.*—A circuit court being a court of general jurisdiction, the presumption is, where a judgment has been rendered, that the court had jurisdiction, especially as to the parties, until the contrary is made to appear.

*Long et al. v. Ruch et al.*, 74.

2. *Criminal Law.*—*Where Offense is Committed Partly in One County and Partly in Another.*—*Abortion.*—*Statute Construed.*—Under the provision of section 1649, Burns' R. S. 1894 (1580, R. S. 1881), that "where a public offense has been committed partly in one county and partly in another, or the act or effects constituting or requisite to the consummation of the offense occur in two or more counties, the jurisdiction is in either county," a person charged with procuring an abortion may be indicted and tried in the county in which the woman miscarried and died, although the acts of defendant producing the miscarriage and death were done and committed in another county.

*Hauk v. State*, 238.

## JURY—

*Special Venire.*—*Criminal Law.*—*Statute Construed.*—Under section 1894, Burns' R. S. 1894 (1888, R. S. 1881), the court has the right to order a special venire to serve as jurors in the trial of a criminal cause.

*Hauk v. State*, 238.

**LARCENY**—Description of articles stolen, see CRIMINAL LAW, 11; *Edson v. State*, 283.

An indictment for, may allege the ownership of property stolen to be in either bailee or bailor, see CRIMINAL LAW, 12; *Ib.*

A charge of theft in stealing several articles is not defeated if the proof show the stealing of but few of such articles, see CRIMINAL LAW, 14; *Ib.*

When the exclusive possession of stolen property is presumptive evidence that possessor is the thief, see CRIMINAL LAW, 15; *Johnson v. State*, 522.

One who obtains money by trick or deception is guilty of larceny, and not of obtaining money by false pretenses, see CRIMINAL LAW, 17; *Crum et al. v. State*, 401.

Is an infamous crime within the meaning of section 8, article 2, of the constitution, see **CRIMINAL LAW**, 19; *Ib.*

1. *Evidence*.—A conviction for larceny is not sustained by evidence that a person with whom defendant had been tramping, and with whom he entered a store, stole a suit of clothes, while defendant was looking at clothing in another part of the store, defendant manifesting no surprise upon the arrest of both, immediately upon leaving the store. *Martin v. State*, 519.
2. *Identification of Stolen Property*.—A watch and chain, the stealing of which is charged, are sufficiently identified, where the prosecuting witness testified that the watch found in defendant's possession was exactly like his watch, and positively identified the chain attached thereto as the chain attached to his watch at the time it was stolen. *Johnson v. State*, 522.

**LAW OF CASE**—A decision of the Appellate Court constitutes the law of the case on a subsequent appeal to the Supreme Court involving the same question, see **APPEAL AND ERROR**, 41; *James v. Lake Erie, etc., R. W. Co.*, 615.

**LEASE**—Action to reform, see **REFORMATION OF INSTRUMENTS**; *Habbe v. Viele*, 116.

**LICENSES**—See **INTOXICATING LIQUORS**.

1. *Parol License to Pass Over Land*.—In order that a parol license to pass over the land of another shall become irrevocable, it must be shown that money was expended, or expense incurred by the licensee upon the faith of such license. *Noftsgen v. Barkdoll et al.*, 531.
2. *Naked License*.—*Revocable at Pleasure*.—Where the owner of real estate permits, without objection, an adjoining owner to use his lands as a passageway, such permission amounts to no more than a naked license which is revocable at the pleasure of the licensor. *Ib.*

**LIMITATION OF ACTIONS**—As to action to contest the validity and to resist the probate of a will, see **WILLS**, 7; *Evansville, etc., Co. et al. v. Winsor, by Next Friend*, 682.

*Notes Secured by Mortgage*.—*Indemnifying Mortgages*.—Where an indemnifying mortgage was executed to secure sureties on note of principal, and afterward such sureties pay the note secured by them and take the principal's note for the amount so paid, such note is subject only to the statutes of limitations applicable to any notes secured by mortgage.

*Bray, Admr., et al. v. First Avenue Coal Mining Co. et al.*, 599.

**LONGHAND MANUSCRIPT OF EVIDENCE**—How made part of record under act of 1897, see **APPEAL AND ERROR**, 20; *Weakley v. Wolf*, 208.

How made part of record prior to act of 1897, see **APPEAL AND ERROR**, 19; *Campbell v. State*, 527.

**MALICIOUS PROSECUTION**—

1. *Defense*.—*When Prosecution Instituted by Advice of Attorney*.—Where in an action for malicious prosecution it is shown that defendant, before instituting such prosecution, consulted an attorney, placed all the facts before him fully and fairly, and acted upon his advice, such proof makes out a case of probable cause. *Terre Haute, etc., R. R. Co. v. Mason*, 578.

2. *Advice of Counsel*.—The fact that the general manager of a railroad company who supervised and directed a prosecution for such company was himself a lawyer would in no way affect the defense of such company in an action for malicious prosecution that it, through such general manager, sought the advice of an attorney in reference to such prosecution, and acted thereon. *Ib.*
3. *Grand Jury Indictment*.—*Burden of Proof*.—Where in an action for malicious prosecution the prosecution was not instituted on the affidavit of the prosecuting witness, but all of the information was placed in the hands of the prosecuting attorney and by him laid before the grand jury, the burden is upon plaintiff to show that the defendant was the prosecutor, and that the prosecution was without reasonable or probable cause. *Ib.*
4. *Grand Jury Indictment*.—*Probable Cause*.—A grand jury indictment is not conclusive evidence, but may be considered along with other facts found by the jury in the trial of a case of malicious prosecution, for the purpose of showing whether or not there was probable cause shown. *Ib.*
5. *Probable Cause*.—*Burden of Proof*.—In an action for malicious prosecution the burden is on plaintiff to show that at the time the prosecution complained of was instituted there was no probable cause for prosecution, and that the same was malicious. *Ib.*
6. *Defense*.—*Probable Cause*.—Where in an action for damages for malicious prosecution the one charged with having instituted such prosecution can show that his conduct at the time was such as a reasonable and prudent man would be likely to exhibit under like circumstances, it will be sufficient to defeat a recovery. *Ib.*
7. *Necessary Proof*.—The inquiry in an action for malicious prosecution must be, not whether the plaintiff was or was not guilty of the offense for which he was prosecuted, but whether, at the time when the prosecution began there was or was not probable cause for bringing it, and whether defendant acted with or without malice. *Ib.*
8. *Special Findings*.—A finding by the jury in a trial for malicious prosecution that such prosecution was maliciously brought by the railroad company is inconsistent with the finding that the action of the officer of the company who directed all of the proceedings on the part of the company was without "any hatred, ill will or malice toward the plaintiff." *Ib.*

**MANDAMUS**—Board of election commissioners may be required by mandate to print official ballot as certified, see *ELECTIONS*, 2; *Board of Election Com'rs, etc., v. State, ex rel. Sides*, 675.

May be invoked to compel attendance of absent trustee at meeting to elect county superintendent of schools, see *COUNTY SUPERINTENDENT*, 8; *Wampler v. State, ex rel. Alexander et al.*, 557.

Requiring return to State of unexpended balance of school tuition fund, see *SCHOOLS*; *Pfau, Treas., etc., v. State, ex rel. Ketcham, etc.*, 539.

Motion to modify mandate may be filed during time allowed for a rehearing, see *APPEAL AND ERROR*, 87; *Pittsburgh, etc., R. W. Co. v. Mahoney, Admr.*, 196.

Where a peremptory writ of mandate has been ordered by the trial court against a justice of the peace in his official capacity, as—

signments of error presenting causes of error on behalf of the appellant as an individual cannot be considered, see **APPEAL AND ERROR**, 9; *Placard v. State, ex rel. Scholl*, 305.

1. *To Compel Auditor to Place Taxes on Tax Duplicate Accounted for by Treasurer.*—The assignee of a tax lien, for taxes accounted for by a county treasurer in his annual settlement with the county auditor, cannot maintain mandamus proceedings to compel such auditor to place such taxes on the tax duplicate, after a period of nearly twenty years had elapsed from the time it was alleged that the assignor was charged with and accounted for the taxes.

*State, ex rel. Riley v. Taggart, Aud., et al.*, 481.

2. *Proper Remedy to Coerce a Public Officer to Discharge His Duty.*—Mandamus is the proper remedy to coerce an officer to discharge a public duty, and if it is a matter in which the people in general are interested it is not required that the applicant show any legal or special interest in the result sought to be obtained. It is only necessary that he be a citizen, interested in common with other citizens in the execution of the law.

*Wampler v. State, ex rel. Alexander et al.*, 557.

3. *Alternative Writ.—Sufficiency.—Statute Construed.*—An alternative writ of mandate, under section 5968, Burns' R. S. 1894, requiring the return to the State of unexpended school tuition revenue, which sets out the unexpended balance in excess of \$100.00 apportioned by the State to such school corporation, and alleges that such balance remains in the hands of the treasurer thereof, and that such treasurer refuses to refund same to the county treasurer, although often requested to do so, is sufficient.

*Pfau, Treas., etc., v. State, ex rel. Ketcham, Atty. Gen., etc.*, 559.

4. *Practice.—Demurrer.*—In a mandamus proceedings, if the facts in the alternative writ alone, or when supplemented by those in the application, are sufficient to entitle the applicant to the peremptory writ, a demurrer addressed to the alternative writ alone, or to both the writ and application, should be overruled.

*Wampler v. State, ex rel. Alexander et al.*, 557.

**MARKET**—When property owner may obtain injunctive relief against maintenance of, see **MUNICIPAL CORPORATIONS**, 6; *City of Richmond et al. v. Smith*, 294.

**MARRIED WOMEN**—When action brought by, does not abate upon her death, see **ABATEMENT**; *Burnett v. Milnes et al.*, 230.

**MASTER AND SERVANT**—Negligence cannot be imputed to the master for failure to foresee and guard against a danger which is wholly improbable, see **NEGLIGENCE**, 1; *Standard Oil Co. v. Helmick*, 457.

1. *Assumption of Risk.—Promise to Repair.*—Where a servant, by reason of the promise of the master to make repairs, continues in the service after notice of a defect in tools or machinery augmenting the danger of the service, the servant may recover for an injury caused by such defect within such period of time after the promise to repair as would be reasonable to allow for such repairs to be made; but when such promise to repair is not general, but dependent upon the completion of a certain job of work, the servant cannot recover for an injury received by reason of such defect before the completion of such job of work. *Id.*

2. *Damages for Death of Servant.—Defective Appliances.—Knowledge of Danger.*—A recovery cannot be had for the death of a serv-

ant, caused by defective appliances furnished by the master. where it is shown that the servant had equal, if not better opportunities of knowing the condition of such appliances than the master.

*Wolf, Admr., v. Big Creek Stone Co., 317.*

8. *Release of Liability for Injuries Sustained by Servant.*—A release by an employe of an express company of all liability for injuries sustained by the negligence of the employer "or otherwise," includes the liability of the express company to hold a railroad company, with which it does business, harmless against claims by employes of the express company for injuries, and precludes an action against the railroad company for causing his death, by suddenly closing the opening between parts of a train while he was passing between them in discharge of his duty as employe of such express company.

*Pittsburgh, etc., R. W. Co. v. Mahoney, Admr., 196.*

4. *Exemption From Liability.*—*Express Company.*—*Notice to Servant.*—An employe of an express company who goes upon the tracks of a railroad company in the course of his employment is chargeable with notice of a contract between the express company and the railroad company to the effect that the former will hold the latter harmless against claims by employes of the express company for negligence of the railroad company. *Ib.*

#### **MECHANIC'S LIEN—**

1. *Appointment of Receiver for Property.*—*Sale of Property.*—A mechanic's lien is not affected by the appointment of a receiver for the property; and upon the sale of the property by the receiver the lien attaches to the proceeds of the sale.  
*Totten & Hogg Iron, etc., Co., Intervener, v. Muncie Nail Co. et al., 372.*
2. *Machinery.*—*Statute Construed.*—Under the provision of section 7255, Burns' R. S. 1894, a lien may be acquired on an engine and machinery by one furnishing repairs therefor, notwithstanding such repairs were not attached to the machinery at once, but set upon blocks near by, to be ready when the old parts could be no longer used. *Ib.*

**MOORE LAW**—Is constitutional, see INTOXICATING LIQUORS, 1, 2:

*Shea v. City of Muncie, 14.*

**MORTGAGES**—Given to secure a precedent debt does not constitute the holder a *bona fide* purchaser, see INSTRUCTIONS, 16; *Adams et al. v. Vanderbeck et al., 92.*

Recording of, is notice to subsequent purchasers or incumbrancers, see NOTICE; *Schmidt et al. v. Zahndt, 447.*

Release of, by a trustee of a corporation, see CORPORATIONS, 8; *Smith, Tr., et al. v. Wells Mfg. Co. et al., 333.*

1. *Secures the Debt, Not the Evidence of the Debt.*—A mortgage secures the debt, and no matter what changes are made in the form of the evidence of such debt, the mortgage still remains good as security therefor.  
*Bray, Admr., et al. v. First Avenue, etc., Co. et al., 599.*
2. *When a Creditor Cannot Object Because Executed in Fraud of Creditors.*—A creditor cannot object to a mortgage of his debtor on the ground that it was executed and received in fraud of creditors, where it was given in pursuance of an agreement between himself and the mortgagee.  
*Smith, Tr. et al. v. Wells Mfg. Co. et al., 333.*

can lead to but one conclusion, the court will adjudge, as a matter of law, that there is, or is not negligence.

*Young v. Citizens' Street R. R. Co.*, 54.

**NEGOTIABLE PAPER**—Effect of stipulation in, as to extension of time of payment, see **BILLS AND NOTES**, 2; *Mitchell v. St. Mary et al.*, 111.

**NEW TRIAL**—When new trial as of right should not be granted, see **QUIETING TITLE**; *Thompson v. Kreisher*, 573.

Where the record shows that a motion for a new trial was presented for the consideration of the court, it will be presumed, on appeal, that the motion was properly filed, see **APPEAL AND ERROR**, 34; *Habbe v. Viele* 116.

**Surprise**.—*Newly Discovered Evidence*.—*Statute Construed*.—The fact that an adversary party produces evidence not anticipated is not such surprise as is contemplated by section 568, Burns' R. S. 1894, providing that a new trial may be granted for "surprise which ordinary prudence could not have guarded against."

*Working v. Garn et al.*, 546.

**NOTICE—**

**Records of Deeds and Mortgages**.—The recording of deeds and mortgages is notice to subsequent purchasers and incumbrancers only. *Schmidt et al. v. Zahrdt*, 447.

**NUISANCE—**

1. **Natural Gas**.—A gas well sunk to supply fuel for a manufacturing plant is not *per se* a nuisance.

*Windfall Mfg. Co. v. Patterson et al.*, 414.

2. **When a Business Will be Enjoined as**.—A business which is a nuisance *per se*, as also one that is so conducted as to become an actual nuisance, will be enjoined; but a business which merely threatens to become a nuisance will be enjoined only where the court is satisfied that the threatened nuisance is inevitable. *Ib.*

**NUNC PRO TUNC ENTRY**—Motion to correct record of judgment by, is not a part of the record unless made so by bill of exceptions, see **APPEAL AND ERROR**, 18; *Clause Printing Press Co. et al. v. Chicago Trust and Savings Bank*, 680.

Hearing of a motion to correct a record of a judgment by *nunc pro tunc* entry, not a trial, see **APPEAL AND ERROR**, 14; *Ib.*

**OFFICERS**—Interested in public contract, see **CRIMINAL LAW**, 10; *State v. Feagans*, 621.

The successor of a city treasurer elected at a special election after the incorporation of the city in 1894 could not be elected until the first Tuesday in May, 1898, see **ELECTIONS**, 3; *State, ex rel. Schrisler, v. Winter*, 177.

**Mandamus** is the proper remedy to coerce a public officer to discharge his duty, see **MANDAMUS**, 2; *Wampler v. State, ex rel. Alexander et al.*, 557.

**School Trustees**.—*Failure to File Bond*.—*Vacancy*.—*Statute Construed*.—Under the provision of article 15, section 3, of the constitution, that officers who are elected for a term are thereby authorized to continue to discharge the duties of the office



2. **Ordinance.—Action for Violation of, a Civil Suit.—Evidence.**—In a civil suit by a city for the violation of an ordinance restricting the sale of intoxicating liquor to resident portions of the city, it is not essential to recovery by the city to prove a sale to both persons named in the complaint, proof of sale to one is sufficient. *Ib.*
3. **Validity of Ordinance.**—The question whether an ordinance is reasonable cannot be raised to affect its validity, where the power to enact the particular ordinance is specifically conferred upon the municipal corporation. *Ib.*
4. **Improvement of Street.—Preliminary Order.**—The preliminary order by resolution declaring a necessity for the improvement of a street, as provided by section 4289, Burns' R. S. 1894, is not essential to the jurisdiction of the common council of a city.  
*Hughes et al. v. Parker et al., 692.*
5. **Foreclosure of Assessment Lien.—Indebtedness of City Beyond Constitutional Limit.**—In an action by a contractor against a property owner for the foreclosure of a street assessment lien, the question as to whether or not the city, at the date of entering into the contract for the improvement, was indebted beyond the constitutional limit, and did not have money in its treasury sufficient to pay its part of the cost thereof, cannot arise. *Ib.*
6. **Market.—Nuisance.—Injunction.**—A property owner who owns the fee in a part of a street set apart by a city as a market place, and whose access to her lot is thereby appreciably impeded, and a nuisance created at her door, is entitled to injunctive relief against the maintenance of such market.  
*City of Richmond et al. v. Smith, 294.*

#### MUTUAL LIFE INSURANCE—

- Joint Action by Policy Holders.**—The holders of separate and independent policies in a mutual life insurance company may join as plaintiffs in a suit to enforce a common interest.  
*Carmien et al. v. Cornell et al., 83.*

**NATURAL GAS**—A gas well not a nuisance *per se*, see NUISANCE, 1; *Windfall Mfg. Co. v. Patterson, 414.*

**Drilling Well Near Dwelling.—Injunction.**—The drilling of a gas well within 152 feet of a dwelling house will not be enjoined on account of the noise, pollution of the air, danger from fire or explosion that would result from operating the well, or on account of water or oil from the well, where it is not shown with certainty that water, oil, or gas will be found, and it is not shown that the gas well could not be operated in such a manner as to avoid the injuries apprehended. *Ib.*

**NEGLIGENCE**—In an action for personal injuries based upon negligence, the fact that a particular act of negligence prohibited by statute is included in the acts constituting the negligence does not confine and limit the theory of the complaint to the statutory offense, see PLEADING, 4; *Cleveland, etc., R. W. Co. v. Gray, 266*

1. **Master and Servant.**—Negligence cannot be imputed to the master for failure to foresee and guard against a danger which is wholly improbable. *Standard Oil Co. v. Helmick, 457.*
2. **When a Question of Law.**—Where the facts are undisputed, and the inferences which may be drawn from them are unequivocal and

can lead to but one conclusion, the court will adjudge, as a matter of law, that there is, or is not negligence.

*Young v. Citizens' Street R. R. Co.*, 54.

**NEGOTIABLE PAPER**—Effect of stipulation in, as to extension of time of payment, see **BILLS AND NOTES**, 2; *Mitchell v. St. Mary et al.*, 111.

**NEW TRIAL**—When new trial as of right should not be granted, see **QUIETING TITLE**; *Thompson v. Kreisher*, 573.

Where the record shows that a motion for a new trial was presented for the consideration of the court, it will be presumed, on appeal, that the motion was properly filed, see **APPEAL AND ERROR**, 84; *Habbe v. Viele* 116.

**Surprise**.—*Newly Discovered Evidence*.—*Statute Construed*.—The fact that an adversary party produces evidence not anticipated is not such surprise as is contemplated by section 568, Burns' R. S. 1894, providing that a new trial may be granted for "surprise which ordinary prudence could not have guarded against."

*Working v. Garn et al.*, 546.

**NOTICE**—

**Records of Deeds and Mortgages**.—The recording of deeds and mortgages is notice to subsequent purchasers and incumbrancers only.

*Schmidt et al. v. Zahndt*, 447.

**NUISANCE**—

1. **Natural Gas**.—A gas well sunk to supply fuel for a manufacturing plant is not *per se* a nuisance.

*Windfall Mfg. Co. v. Patterson et al.*, 414.

2. **When a Business Will be Enjoined as**.—A business which is a nuisance *per se*, as also one that is so conducted as to become an actual nuisance, will be enjoined; but a business which merely threatens to become a nuisance will be enjoined only where the court is satisfied that the threatened nuisance is inevitable. *Ib.*

**NUNC PRO TUNC ENTRY**—Motion to correct record of judgment by, is not a part of the record unless made so by bill of exceptions, see **APPEAL AND ERROR**, 13; *Clause Printing Press Co. et al. v. Chicago Trust and Savings Bank*, 680.

Hearing of a motion to correct a record of a judgment by *nunc pro tunc* entry, not a trial, see **APPEAL AND ERROR**, 14; *Ib.*

**OFFICERS**—Interested in public contract, see **CRIMINAL LAW**, 10; *State v. Feagans*, 621.

The successor of a city treasurer elected at a special election after the incorporation of the city in 1894 could not be elected until the first Tuesday in May, 1898, see **ELECTIONS**, 8; *State, ex rel. Schrisler, v. Winter*, 177.

Mandamus is the proper remedy to coerce a public officer to discharge his duty, see **MANDAMUS**, 2; *Wampler v. State, ex rel. Alexander et al.*, 557.

**School Trustees**.—**Failure to File Bond**.—**Vacancy**.—*Statute Construed*.—Under the provision of article 15, section 8, of the constitution, that officers who are elected for a term are thereby authorized to continue to discharge the duties of the office

until a successor is elected and duly qualified, a school trustee who is elected as his own successor, and who, before entering upon the discharge of his duties as such officer, took the oath of office, as provided by section 5915, Burns' R. S. 1894, and upon the organization of the school board was elected president of such board, does not vacate the office of school trustee by failure to file his bond as such president within ten days after the commencement of his term of office, as provided by section 7542, Burns' R. S. 1894 (5527, R. S. 1881).  
*Koerner v. State, ex rel. Judy, 158.*

**OPINION EVIDENCE**—When a nonexpert witness may testify as to physical condition of a person, see EVIDENCE, 9; *Cleveland, etc., R. W. Co. v. Gray, 266.*

**ORDINANCE**—Failure to record and sign, see MUNICIPAL CORPORATIONS, 1; *Shea v. City of Muncie, 14.*

Action for violation of ordinance restricting sale of intoxicating liquor to resident portions of city, see MUNICIPAL CORPORATIONS, 2; *Ib.*

Restricting sales of intoxicating liquors to the business portion of a city need not describe the boundary of the business portion, see INTOXICATING LIQUORS, 6; *Ib.*

Where the power to enact the particular ordinance is specially conferred upon the municipal corporation, the question as to whether it is reasonable cannot be raised to affect its validity, see MUNICIPAL CORPORATIONS, 3; *Ib.*

**OVERRULED CASES**—*Harris v. Harris*, 61 Ind. 117, in part, see WILLS, 8; *Evansville, etc., Co. et al. v. Winsor, by Next Friend, 682.*

*Strong v. State*, 86 Ind. 206, in part, see EVIDENCE, 6; *Crum et al. v. State, 401.*

**Construction of Statute.**—*Last Decision the Law.*—*Exceptions.*—The last construction placed upon a statute by the Supreme Court will be held to be the law upon the subject, although the previous construction was contrary thereto, as to parties who did not enter into any contract relations on the faith of the former construction, or change their position to the detriment of any of them, or part with value on the faith of such construction.

*Town of Hardinsburg et al. v. Cravens, 1.*

**PARENT AND CHILD—**

**Custody of Child.**—In a controversy for the custody of a child, whether between the father and mother, or between them, or either of them and third persons, the welfare of the child is paramount to the claims of either parent, and the order of court should in all such cases be made with regard alone to the best interests of the child.

*Schleuter v. Canatsy et al., 384.*

**PARTIES**—Policy holders in a mutual life insurance company may join as plaintiffs in a suit to enforce a common interest, see MUTUAL LIFE INSURANCE; *Carmien et al. v. Cornell et al., 83.*

Upon the death of a married woman, who was plaintiff in an action to set aside, for fraud, a judgment, her surviving husband and daughter are proper parties, see PLEADING, 15; *Burnett v. Milnes et al., 230.*

**Examination of Before Trial.—Notice.—Refusal.—Effect.—Practice.—Statute Construed.**—The right to examine a party to a suit prior to the trial, under section 517, *et seq.*, Burns' R. S. 1894, is given upon notice to "the party to be examined and any other adverse party," and an answer of a party should not be stricken from the files on account of refusal to appear and submit to such examination, where a party, adverse to the examining party, was not notified of such examination. *Working v. Garn et al.*, 546.

### PARTITION—

1. **Judgment.**—A decree of partition is *res adjudicata* that the parties thereto were co-tenants in the whole of the land involved in the decree, and estops them from denying such co-tenancy.

*Irvin v. Buckles*, 339.

2. **Real Estate Included by Mistake.—Judgment.—Collateral Attack.**—A widow was the owner of forty acres of land by reason of the fact that she and her husband at the time of his death held the same as tenants by entireties. She also owned the undivided one-third interest in the remaining real estate of which her husband died seized. Being ignorant of the fact that at the death of her husband she became the owner in fee simple of the forty acres held by entireties, said tract was included in the real estate described in the petition for partition, and alleged to be owned by plaintiff and defendants as tenants in common. The court found as alleged in the petition, and the widow's statutory one-third was set off out of the other real estate, and the forty acres was included in the part set off to the defendants. When the widow learned of her mistake as to her legal rights she brought suit to quiet her title in the forty-acre tract. Held, that she could not thus collaterally attack the decree in partition. *Id.*

3. **Wife of Co-Tenant Not a Necessary Party.**—In a partition suit between co-tenants a wife of one of the co-tenants is not a necessary party; and in the event of a partition sale of real estate in a proceeding wherein such wife was not made a party, she is bound by such proceedings and sale, though she outlives her husband and becomes his surviving widow; for the inchoate right of the wife to one-third of her husband's land, subsists by virtue of the seizin of the husband, and is always subject to any incumbrance, infirmity, or incident which the law attaches to the seizin either at the time of the marriage or at the time the husband becomes seized; and a liability to be divested by a partition sale is an incident which the law affixes to all estates of co-tenancy.

*Haggerty v. Wagner*, 625.

### PARTNERSHIP—

**May Pay or Secure Bona Fide Debts of Individual Partners.**—Partners may waive the right to compel partnership assets to be first applied to the payment of partnership debts, and they may transfer or incumber the firm property to pay or secure *bona fide* debts of the individual members of the firm, and the transaction cannot be successfully attacked, either by a creditor or a receiver appointed by reason of the insolvency of the firm.

*Old National Bank, etc., v. Heckman et al.*, 490.

**PASSENGER**—Negligence in alighting from train, see **CARRIERS**, 2; *Cincinnati, etc., R. W. Co. v. McLain*, 188.

### PERJURY—

**False Oath to Affidavit and Information.**—A false oath, made before the mayor of a city, charging a person with larceny, may become

the subject of a prosecution for perjury, notwithstanding no warrant was issued for the arrest of the accused and no legal steps taken in the case. *Shell v. State*, 60.

**PHYSICIAN**—Competency of, to testify as to facts obtained in his professional business, see EVIDENCE, 10; *Hauk v. State*, 238.

**PLEADING**—Amendments of, largely within discretion of court, see COURTS; *Burnett v. Milnes et al.*, 230.

1. Facts, not conclusions, should be stated in pleadings.  
*Davis, Sheriff, v. Clements*, 605.
2. *Material Facts Not Alleged by Way of Recital*.—Material facts, essential to the existence of a cause of action, must be alleged directly and not by way of recital.  
*Erwin v. Central Union Telephone Co. et al.*, 365.
3. *Action for Corporation Cannot be Maintained in Name of Officer who is a Mere Agent*.—The treasurer of a corporation, to whom a note has been transferred as a mere custodian of the corporation, is not a trustee of an express trust, within the meaning of section 252, Burns' R. S. 1894, and, therefore, cannot maintain an action on the note in his own name.  
*Mitchell v. St. Mary et al.*, 111.
4. *Complaint.—Negligence.—Railroad Crossings*.—In an action for personal injuries, based upon the negligence of defendant, the fact that a particular act of negligence prohibited by statute is included in the acts constituting the negligence does not confine and limit the theory of the complaint to the statutory offense charged.  
*Cleveland, etc., R. W. Co. v. Gray*, 266.
5. *Complaint.—Action to Enjoin Enforcement of Judgment.—Sufficiency*.—A complaint in an action to enjoin the enforcement of a judgment, must allege what the record of the case in which the decree was rendered shows on the subject.  
*Davis, Sheriff, v. Clements*, 605.
6. *Complaint.—Railroad Crossings.—Violation of Statute*.—In an action for personal injuries against a railroad company, based upon the negligence of such company, in violating section 2293, Burns' R. S. 1894 (2172, R. S. 1881), prescribing a penalty for a train to approach the crossing of another railroad track without stopping and ascertaining that there is no other train or locomotive in sight, need not negative the exception provided by section 5156, Burns' R. S. 1894, where there is a system of interlocking automatic signals.  
*Cleveland, etc., R. W. Co. v. Gray*, 266.
7. *Complaint.—Mutual Life Insurance*.—A complaint by policy holders in a mutual life insurance company to enjoin the company from making an assessment upon its members to pay certain specified policies claimed to be invalid, alleging that the plaintiffs are policy holders in defendant company, is sufficient to show that the plaintiffs were members of the company, without setting forth all the steps taken by the appellees to become members, or stating the amount of fees or assessments paid by them.  
*Carmien et al. v. Cornell et al.*, 83.
8. *Complaint.—Answer*.—Where a complaint discloses a *prima facie* cause of action under a statute, it is for the defendant, by way of answer, to show that the plaintiff should not recover notwithstanding the allegations of the complaint.  
*Cleveland, etc., R. W. Co. v. Gray*, 266.
9. *Amended Complaint.—Practice*.—Where a complaint to which a demurrer has been sustained is refiled without any changes being

made therein, the ruling on the demurrer to the original complaint applies equally to the unchanged "amended complaint," and it is also wholly out of the record.

*Ellis v. City of Indianapolis et al.*, 70.

10. *Supplemental Complaint.—Practice.*—Where, at the time of filing a supplemental complaint, the original and amended complaints were out on demurrer, such supplemental complaint has nothing to stand upon, and cannot of itself be made the foundation of an action. *Ib.*

11. *Cross-Complaint.*—A cross-complaint must be sufficient within itself, without aid from any other pleadings in the case; yet for matters of mere description and identification many of the allegations of the complaint may be referred to.

*Schmidt et al. v. Zahndt*, 447.

12. *Answer.*—Where an answer purports to be a bar or defense to the entire cause of action stated in the complaint, and in fact answers only a part of it, such answer is bad on demurrer for want of sufficient facts to constitute a defense.

*Breyfogle et al. v. Stotsenburg, Tr.*, 552.

13. *Abatement Not Pleaded with Answer in Bar.*—An answer in abatement cannot be pleaded with an answer in bar, but must precede it, and the issue must be tried first and separately.

*Carmien et al. v. Cornell et al.*, 83.

14. *Practice.—Waiver of Ruling on Demurrer.*—If a defendant answers before his demurrer to the complaint is disposed of he waives a ruling on the demurrer.

*Earhart et al. v. Farmers' Creamery et al.*, 79.

15. *Action to Set Aside Judgment for Fraud.—Death of Plaintiff Who Was a Married Woman.—Parties.*—A husband and daughter of a devisee who dies after commencing an action to set aside, for fraud, a judgment refusing to admit the will to probate, have such an interest, as the heirs of such plaintiff, as make them proper parties plaintiff after her death.

*Burnett v. Milnes et al.*, 230.

16. *Negligence.—Breach of Statutory Duty.*—Where a breach of a statutory duty is alleged, and exceptions are found in the statutory declaration of duty, the pleader must show that the breach is not included in the exception. But if the exception is stated in a subsequent clause or section of the statute, or if it is declared in another statute then such exception should be shown by the way of defense to the action.

*Cleveland, etc., R. W. Co. v. Gray*, 266.

**PRACTICE**—Overruling a motion to quash a writ of *habeas corpus* tests the sufficiency of the application for such writ, see *HABEAS CORPUS*, 2; *Schleuter v. Canatsy et al.*, 384.

If a defendant answers before his demurrer to the complaint is disposed of, he waives a ruling on the demurrer, see *PLEADING*, 14; *Earhart et al. v. Farmers' Creamery et al.*, 79.

Where a demurrer has been sustained to a complaint, and the complaint is refiled as an amended complaint, the original demurrer applies equally to the unchanged amended complaint, see *PLEADING*, 9; *Ellis v. City of Indianapolis et al.*, 70.

Admission of evidence after submission of cause, see *TRIAL*, 4; *Working v. Garn et al.*, 546.

Appeals from board of county commissioners stand for trial *de novo*, see *COUNTY COMMISSIONERS*; *Head et al. v. Doehleman*, 145.

1. *Motion to Strike Out a Motion.*—There is no error in refusing to entertain a motion to strike out a motion.  
*Clause Printing Press Co. et al. v. Chicago, etc., Bank, 680.*
2. *Motion to Strike Out Another Motion.*—A motion to strike out another motion is not a proper motion, but if entertained and sustained by the court, it is equivalent to overruling the first motion.  
*Long et al. v. Ruch et al., 74.*
3. *Variance Between Allegations of Complaint and Proof.*—A plaintiff must recover according to the allegations of his complaint, or not at all. He cannot recover on the evidence which makes a case materially different from the case made by the pleadings.  
*Cincinnati, etc., R. W. Co. v. McLain, 188.*
4. *Sustaining Demurrer to Special Answer.—Harmless Error.*—No error was committed in sustaining a demurrer to a special answer where the same evidence was admissible under the general denial, nor was such ruling rendered harmful by the subsequent withdrawal of the general denial.  
*Board of Election Com'rs, etc., v. State, ex rel. Sides, 675.*
5. *Special Verdict.*—A party who makes no demand for a special verdict cannot complain that the demand therefor by the opposite party was not complied with.  
*Sutherland v. Cleveland, etc., R. R. Co., 308.*
6. *Negligence.—When Court May Direct Verdict.*—In an action for personal injury, based upon the negligence of defendant, plaintiff must aver and prove his freedom from contributory negligence proximately causing his injury, and upon failure of such proof it is the duty of the trial court to instruct the jury to find against him, even though he establish all other essential facts of his cause of action.  
*Ib.*
7. *Commissioners' Court.—Cannot Set Aside or Modify Final Order or Judgment.*—When a proceeding is finally ended before the board of county commissioners, they cannot take it up again, and make further orders or modify those which they have already made.  
*Town of Hardinsburg et al. v. Cravens, 1.*

**PRINCIPAL AND AGENT**—Where letter appointing agent was sent without authority of principal, the principal will not be bound by contract made by such agent, see **SPECIFIC PERFORMANCE**; *Campbell v. Galloway et al., 440.*

1. *Real Estate Broker.—Authority to Find Purchaser.—Letter.*—A letter to a real estate agent by the owner of a lease, stating that the writer had paid a specified amount for the lease and would not sell it for less than another specified amount, and all over that sum the agent could have, authorizes the agent to find a buyer, but not to sell the lease.  
*Ib.*
2. *Sale of Real Estate.—When Principal Not Bound by Statement Made by Agent.*—Where an agent, in negotiating a sale of real estate, stated to the purchaser that certain lots belonging to his principal, adjoining such real estate, would not, in his opinion, be fenced while being used for present purposes, and that such purchaser and his customers could pass in and out across said lots, such purchaser is not, by reason of such statement, entitled to have and hold an easement, or perpetual right of way across such lots where such agent had no authority to make a contract of sale without the consent of the principal, and the principal had no knowledge of anything having been said between the purchaser and agent as to the passageway at the time the sale was completed and the deed therefor made.  
*Noftsgger v. Barkdoll et al., 531.*

**PRINCIPAL AND SURETY—**

**Mortgages.**—Where sureties on a note executed by a mining company to a bank, made payments on such note, and renewal notes signed by all of the parties were given to the bank for the balance due, and a note executed by the principal to each surety for the amount paid by him, such payments will not be treated as loans to the principal, but as payments on the note upon which they were sureties and are covered by a mortgage given by the principal, to indemnify them as such sureties.

*Bray, Admr., et al. v. First Avenue, etc., Co. et al.*, 599.

**QUIETING TITLE—**

**Disclaimer of Title.**—*New Trial as of Right.*—*Statute Construed.*—

Where, in an action for possession, and to quiet title to real estate and for damages for the wrongful detention thereof, under section 1062 *et seq.*, Burns' R. S. 1894, the defendant files a disclaimer of any estate or interest in the land, it was error to grant to plaintiff a new trial as of right under section 1076, Burns' R. S. 1894, as it was not the intention of said section to extend such right where the issue and judgment involved but the naked question of possession, with or without damages, and where title was not in question.

*Thompson v. Kreisher*, 573.

**RAILROAD CROSSING.**—When person attempting to cross tracks guilty of contributory negligence, see CONTRIBUTORY NEGLIGENCE; *Sutherland v. Cleveland, etc., R. R. Co.*, 308.

1. **Duty of Managers of Train Approaching a Crossing.**—When means are not provided by which a collision at a railroad crossing is rendered impossible, the rule to stop, look, and listen is not less imperative on a train approaching a crossing of another railroad than upon a traveler about to approach a railroad crossing.

*Cleveland, etc., R. W. Co. v. Gray*, 266.

2. **Signal Lights.**—The fact that signal lights, in a railroad crossing signal system, were obscured from view by a car standing across defendant's track did not excuse defendant company from the duty of stopping its trains to ascertain whether or not the crossing was clear. *Ib.*

3. **Obstruction of Signal Lights.**—That the view of the crossings of two railroads, and of the signals designed to warn a train on one track of the presence of a train on the other was obscured by an electric light maintained by the city will not relieve the company from liability for a collision between a train standing upon the crossing and another train approaching on the other track, as it is bound to exercise care commensurate with the surroundings. *Ib.*

**RAILROADS.**—May contract as private carriers, see CARRIERS, 1; *Pittsburgh, etc., R. W. Co. v. Mahoney, Admr.*, 196.

**Depot and Grounds.**—**Hack Stands.**—Railroad companies have the right to make and enforce reasonable rules and regulations in regard to their stations and grounds, and may designate the stand that hacks and omnibuses shall occupy on such grounds.

*Lucas et al v. Herbert, et al.*, 64.

**REAL ESTATE.**—Disposition of by will, governed by the law of the State where the land is situated, see WILLS, 4; *Evansville, etc., Co. et al. v. Winsor, by Next Friend*, 682.

**REAL ESTATE BROKER.**—As to contract authorizing agent to find a purchaser for, but not to sell real estate, see PRINCIPAL AND AGENT, 1; *Campbell v. Galloway et al.*, 440.



When principal not bound by statement made by agent, see **PRINCIPAL AND AGENT**, 2; *Naftser v. Barkdoll et al.*, 531.

**RECEIVERS**—A mechanic's lien is not affected by the appointment of a receiver for the property, and upon the sale of the property the lien attaches to the proceeds of the sale, see **MECHANIC'S LIEN**, 1; *Totten & Hogg, etc., Co. v. Muncie Nail Co. et al.*, 372.

**RECORDS**—

*Correction of, by nunc pro tunc Entry.*—It is competent for any tribunal to correct its record so as to make it speak the truth.

*Everett et al. v. Deal et al.*, 90.

**REFORMATION OF INSTRUMENT**—As to the sufficiency of evidence to show mutual mistake in the execution of a lease.

*Habbe v. Viele*, 116.

**RELEASE**—By employe of an express company of all liability for injuries sustained by the negligence of the employer or otherwise, includes injuries received from the railroad company, see **MASTER AND SERVANT**, 8; *Pittsburgh, etc., R. W. Co. v. Mahoney, Admr.*, 196.

**REMONSTRANCE**—The only pleading authorized on behalf of the remonstrators against the granting of a license to sell intoxicating liquors, see **INTOXICATING LIQUORS**, 9, 10; *Head et al. v. Doehleman*, 145.

**REPUTATION**—Inquiry as to reputation of a witness not confined to present residence, see **EVIDENCE**, 5; *Hauk v. State*, 238.

**SCHOOLS**—A school trustee who is elected as his own successor, and who before entering upon his duties took the oath of office, and who, upon the organization of the board is elected president, does not vacate the office by failure to file bond within ten days, see **OFFICERS**; *Koerner v. State, ex rel. Judy*, 158.

*Unexpended Balance of Tuition Fund.*—*Order of Payment.*—*Mandamus.*—*Statutes Construed.*—Under the provision of section 5750, Burns' R. S. 1894, all tuition funds in the hands of a township trustee or school treasurer are, in effect, but one fund, and by the provision of section 5956, Burns' R. S. 1894, are to be applied and expended in the same manner; and it cannot be held, in a mandamus proceeding, under section 5968, Burns' R. S. 1894, to compel the treasurer of a school corporation to pay over to the county treasurer an unexpended balance of school tuition revenue in excess of \$100.00, apportioned to such school corporation by the State, that the treasurer first paid out to his teachers the funds received from the State, and then those derived from local sources.

*Pfau, Treas., etc., v. State, ex rel. Ketcham, etc.*, 539.

**SEWERS**—The word "drainage," as used in section 3598, Burns' R. S. 1894, providing for the drainage of cities, includes "sewerage," see **DRAINS**, 2, 3; *City of Valparaiso v. Parker et al.*, 379.

**SPECIAL FINDINGS**—Where facts found are inconsistent, see **MALICIOUS PROSECUTION**, 8; *Terre Haute, etc., R. R. Co. v. Mason*, 578.

When statement of ultimate fact will be disregarded on appeal, see **APPEAL AND ERROR**, 28; *Smith, Tr., et al. v. Wells Mfg. Co. et al.*, 333.

How error as to, made available on appeal, see **APPEAL AND ERROR**, 25; *Winstandley et al. v. Breyfogle, Treas., et al.*, 618.

Where there is no assignment of error as to conclusions of law, no question can be raised on appeal as to motion for judgment, see **APPEAL AND ERROR**, 27; *Pfau, Treas., etc., v. State, ex rel. Ketcham, etc.*, 539.

1. *Conclusions of Law Improperly Stated Among Facts Found.*—The conclusions of law stated among the facts found are void and amount to nothing. *Old National Bank, etc., v. Heckman et al.*, 490.
2. *Habeas Corpus.—Statute Construed.*—Section 560, Burns' R. S. 1894 (551, R. S. 1881), providing that the court shall, at the request of either party, make a special finding of the facts and state the conclusions of law thereon, does not apply to *habeas corpus* proceedings. *Schleuter v. Canatsy et al.*, 384.
3. *Sufficiency Of.—Presumptions.*—Presumptions or intendments are not available to support a special finding, but the facts in issue must be stated with reasonable certainty. *Hill et al. v. Swihart et al.*, 319.
4. *Sufficiency Of.—Presumptions.—Liens.*—Where judgment creditors claim that the lien of their judgments are superior to the lien of a mortgage, and the special finding in the case does not disclose in what county or court such judgments were rendered, the Supreme Court will not presume on appeal that the judgments were rendered in the county in which the real estate is situated, and hold same to be liens on such real estate. under section 617, Burns' R. S. 1894 (608, R. S. 1881). *Ib.*

**SPECIAL JUDGE**—The appointment of a disinterested attorney of the State, in good standing, to try a cause the venue of which has been taken from the regular judge, is wholly within the discretion of the court, see **VENUE**, 8; *Hauk v. State*, 238.

**SPECIAL VERDICT**—A party who makes no demand for a special verdict cannot complain that such demand of the opposite party was not complied with, see **PRACTICE**, 5; *Sutherland v. Cleveland, etc., R. R. Co.*, 308.

#### **SPECIFIC PERFORMANCE—**

*Contract for Sale of Lease.—Agency.—Unauthorized Letter.*—A contract for the sale of a gas and oil lease entered into by one purporting to be the agent of the owner of the lease cannot be enforced against the principal, where the letter appointing the agent was sent without the authority of the principal, and was promptly repudiated by him. *Campbell v. Galloway et al.*, 440.

**STATUTE OF FRAUDS**—An agreement to pay the indebtedness of the firm, and to pay the retiring partner one-half of a judgment against the firm in the event same is reversed on appeal, as a part consideration for the sale and transfer of a half interest in the partnership property, is not within the statute of frauds, see **CONTRACTS** 1; *Dickson v. Conde et al.*, 279.

**STATUTORY CONSTRUCTION**—For statutes cited and construed, see table on page xxv.

Last construction placed upon a statute by the Supreme Court will be held to be the law upon the subject, see OVERRULED CASES; *Town of Hardinsburg et al. v. Cravens, 1.*

The provision in section 5900, Burns' R. S. 1894, as to time of electing county superintendent of schools is directory merely, and the failure to get a quorum on that day does not prevent a meeting for that purpose on a subsequent day, see COUNTY SUPERINTENDENT. 2; *Wampler v. State, ex rel. Alexander, 557.*

1. *Title of Act.—Construction.*—The degree of particularity with which the title of an act shall express the subject thereof is not defined by the constitution, but rests with the legislature, and courts will not condemn an act of the legislature for the reason alone that the subject thereof is not fully expressed in the title. *Lewis v. State, 346.*
2. *Manner of Enactment.*—A statute bearing the attestation of the presiding officers of the respective houses of the legislature imports absolute verity, and is conclusive evidence that the statute was in all things duly passed in conformity with the requirements of the constitution. *Ib.*
3. *Acts Passed at the Same Session of Legislature.*—Where two statutes are enacted at the same session of the legislature they should be construed together, if possible; but, if they be irreconcilable, the later supersedes the earlier. *Shea v. City of Muncie, 14.*
4. Where any provision of an act is invalid it may be stricken out, but courts have otherwise no right to add to or take from the law as it is written, or to extend the meaning of the law beyond that which is written, when the meaning is clear. *Board of Election Commissioners of Gibson County et al. v. State, ex rel. Sides, 675.*
5. *Amendments.—Title of Act.—Public Offense Act.—Having in Possession Gill Net, or Seine.*—The title of the public offense statute of 1881 (Acts 1881, p. 174) is sufficiently broad and comprehensive to include the offense of having in possession a gill net, or seine, as defined in the amendatory act of 1889 (Acts 1889, p. 102). *Lewis v. State, 346.*
6. *Public Offense Act.—Having in Possession Gill Net, or Seine.*—Section 2 of the act of 1889 (Acts 1889, p. 102), making it a misdemeanor for any person to have in his possession any gill net, or seine, is but a continuation of section 209 of the public offense act of 1881 as by the act of 1889 amended, and the mere fact that it is divided into two sections instead of one does not result in rendering any part of the act invalid. *Ib.*
7. *Amendments.—Title.*—An amendatory statute is not to be regarded independently of the one which it amends, but may be so framed as to serve to amend certain parts and add such supplementary sections as are embraced in and connected with the subject expressed in the title of the original act. *Ib.*
8. *Questions of Policy and Political Morals.*—The courts in the construction of statutes have nothing to do with questions of policy and political morals; such questions are matters for the consideration of the legislature. *Board of Election Commissioners of Gibson County et al. v. State, ex rel. Sides, 675.*

**STREET RAILROADS—**

1. *Person on Track must Look and Listen.*—One is guilty of contributory negligence in walking upon or attempting to cross an electric street railway track without looking and listening.

*Young v. Citizens' Street R. R. Co.*, 54.

2. *Injury to Person on Track.*—A person who is engaged in laying pipe for a gas company in a trench about three feet from the track of a street railway company, and, in performing his duties as an employe of the gas company, walks upon the track of the street railway company, will be regarded as an ordinary traveler, and is bound to the observance of ordinary care for his own safety. *Ib.*

3. *Special Verdict.*—*Contributory Negligence.*—A special verdict finding that plaintiff upon first approaching a track looked attentively for an electric street car, but saw none, although he saw for a distance of four hundred feet from him, and that he afterwards walked twenty-five feet beside the track without looking again, when he was struck by a car going at the rate of twelve miles an hour, and that there was nothing at any time to prevent his seeing and hearing, fails to show that plaintiff was free from contributory negligence. *Ib.*

**STREETS**—As to injunction to prevent improvements, see **INJUNCTION**, 6; *Everett et al. v. Deal, et al.*, 90.

To prevent the wrongful appropriation of land for a street, injunction the proper remedy, see **INJUNCTION**, 4; *Town of Hardinsburg et al. v. Cravens*, 1.

The preliminary order by resolution declaring a necessity for the improvement is not essential to the jurisdiction of the common council, see **MUNICIPAL CORPORATIONS**, 4; *Hughes et al. v. Parker et al.*, 692.

The question as to whether or not the city was, at the date of entering into a contract for a street improvement, indebted beyond the constitutional limit cannot arise in an action by a contractor against a property owner for the foreclosure of a street assessment lien, see **MUNICIPAL CORPORATIONS**, 5; *Ib.*

**TAXATION—**

1. *County Treasurer.*—*Collection of Unpaid Taxes Charged to Treasurer in His Accounting.*—*Statutes Construed.*—Section 162 of the tax law of 1872 (Acts 1872, p. 102), providing that whenever a county treasurer shall have charged himself and accounted for taxes which have not been paid to him, such taxes shall be deemed as due him personally, whether in or out of office, and may be collected by him in the same way as other taxes are collected, must be construed with section 238 thereof, limiting such right to collect for his own use from the personal property of the tax debtor, and within one year from the time of settlement.

*State, ex rel. Riley, v. Taggart, Aud., et al.*, 431.

2. *Funds of Nonresidents in the Hands of a Receiver in This State.*—The funds of an insolvent mutual benefit assessment society in the hands of a receiver in this State are subject to taxation in the county where they are kept on deposit by such receiver, although the funds had been collected in other states in which the company also did business, and turned over to the Indiana receiver by orders of their respective courts, and were to be distributed to claimants, many of whom were nonresidents.

*Schmidt, Treas., et al. v. Failey, Rec. Supreme Sitting Iron Hall*, 150.

**THEORY**—A party cannot seek relief by one theory on the trial and another on appeal, see **APPEAL AND ERROR**, 2; *Lewis et al. v. Stanley et al.*, 351.

**TOWNSHIPS**—Special tax levied upon the property of a taxing district for the construction of gravel roads is not an indebtedness of the township composing such district, see **GRAVEL ROADS**, 4; *Board, etc., v. Reeves et al.*, 467.

**TRIAL**—

1. *Criminal Law.—Failure of Court to Require State to Elect Upon Which Count of Indictment it Would Ask for Conviction.*—No error was committed in not requiring the State to elect upon which count of an indictment it would ask for a conviction in the trial of a criminal cause, where the court withdrew all of the counts but one from the consideration of the jury, and submitted the question of defendant's guilt to them upon that one alone.

*Hauk v. State*, 238.

2. *Evidence.—Error in Admission.—How Cured.*—An error in the admission of evidence is cured by the court afterward withdrawing same from the jury, where it is not shown that the complaining party was harmed thereby.

*Madden v. State*, 183.

3. *Practice.—Withdrawal of Evidence from Jury not an Instruction.—Statute Construed.*—An oral statement made by the trial judge at the close of the evidence, and after the opening argument had been made, withdrawing certain testimony from the jury, is not an instruction within the meaning of section 1892, Burns' R. S. 1894 (1823, R. S. 1881).

*Ib.*

4. *Admission of Evidence After Submission of Cause.—Practice.*—The rule in applications for new trials on account of newly discovered evidence, that such application must overcome the presumption that a proper effort would have produced the evidence at the trial, is applicable to a motion to permit the introduction of additional evidence after the submission of the cause and before the finding.

*Working v. Garn et al.*, 546.

5. *Practice.—Withdrawal of Evidence from Jury.—Waiver of Error.*—Where the court after the close of the evidence and the beginning of the argument made an oral statement to the jury withdrawing from their consideration certain evidence admitted over objection, error, if any, was waived by the failure of counsel to move the discharge of the jury.

*Madden v. State*, 183.

**VENUE**—

1. *Change Of.—Special Proceeding.—Statute Construed.*—It is error to refuse to grant a change of venue from the county in a contested election case where application therefor has been properly made under the third specification of section 416, Burns' R. S. 1894 (412, R. S. 1881).

*Weakley v. Wolf*, 208.

2. *Change Of.—Criminal Law.—Discretion of Court.—Statute Construed.*—A change of venue in a criminal action, not punishable by death, under the provisions of section 1840, Burns' R. S. 1894 (1771, R. S. 1881), is left to the sound discretion of the trial court, and it must affirmatively appear that such discretion has been abused to the injury of the complaining party in order to secure a reversal on appeal.

*Hauk v. State*, 238.

3. *Change of Judge.—Appointment of Special Judge.—Discretion of Court.—Statute Construed.*—Under section 1839, Burns' R.

S. 1894 (1770, R. S. 1881), in all cases upon a change from the presiding judge, where in the opinion of the court it shall be difficult to procure a regular judge to try the cause, the right to appoint some disinterested attorney of the State in good standing, is wholly within the discretion of the court, and will not be interfered with on appeal, unless it affirmatively appears that the court has abused such discretion to the prejudice of the substantial rights of the complaining party. *Id.*

#### **VENDOR AND PURCHASER—**

**Consideration.—Preexisting Debt.**—Where land is conveyed by the owner to another in payment and satisfaction of a debt due from the grantor to the grantee, who is ignorant of an equity in the land in favor of a third person, the enforcement of such equity against the land will not revive the indebtedness for the payment and satisfaction of which the land was conveyed, and the grantee is as much a *bona fide* purchaser for value as if he had paid cash. *Adams et al. v. Vanderbeck et al.*, 32.

**WIDOW**—Interest in deceased husband's real estate, as against mortgage creditors, see DESCENT AND DISTRIBUTION; *Shobe, Admr.*, v. *Brinson et al.*, 235.

**WILLS**—When a judgment refusing to admit a will to probate will be set aside for fraud, see JUDGMENT, 6; *Burnett v. Milnes, et al.* 230.

1. **Name of Beneficiary.**—It is not essentially necessary that the testator, in his will, name the legatee or devisee, in order to give effect to the bequest; it is sufficient if the beneficiary is so described therein as to be ascertained and identified.

*Dennis, Admr., v. Holsapple*, 297.

2. **When Beneficiary Not Named in Will. — Parol Evidence.**—Where a testatrix devised all of her property to whoever should, at her request, take care of her, providing that the person so selected should have a written statement to that effect, signed by the testatrix, such will is not invalid on account of failure to name a devisee, and a letter written by testatrix to her granddaughter after the execution of the will, telling her that she was sick and requesting her to come and take care of her, informing her that she had made her will and that it was her desire that she should have all of her estate, was admissible in evidence for the purpose of identifying the devisee. *Id.*

3. **Devise. — Power to Convey.**—A widow, by the terms of her husband's will, was invested with a life estate in certain lands, coupled with the power of fully disposing of the fee by devise or bequest if she so desired. After her husband's estate had been fully settled she executed her will making a number of bequests for specified amounts, referring to the property disposed of as "my property," and "my estate," and in the preamble of her will made the statement that she made her will "in pursuance of, and more fully to carry out the provisions of the will of my late husband." *Held*, that the testatrix, by the recitals in the preamble of her will fully indicated her intent and purpose to carry into execution the power conferred upon her by the will of her husband.

*Bullerdick v. Wright*, 477.

4. **Disposition of Real Estate Governed by Law of State Where Situated.**—The disposition of real property by will is governed exclusively by the law of the state where the land is situated.

*Evansville, etc., Co. et al. v. Winsor, by Next Friend*, 682.

5. *Construction. — Advancements.*—Where a testator provides in his will that in the event of the death of one of the beneficiaries therein named before arriving at the age of twenty-one, that his property shall descend the same as if no will had been made, upon the death of such beneficiary testator's property will descend in same manner as though he had died intestate, and advancements made by testator will be taken into account in the division of such estate. *Trammel v. Trammel et al.*, 487.
6. *Contest.*—An action to set aside a will and its probate on the ground that the will has been revoked either expressly or impliedly, is an application to contest the will, within the meaning of the statutes providing for the contest of wills. *Evansville, etc., Co. et al. v. Winsor, by Next Friend*, 682.
7. *Action to Contest is Statutory. — Statute of Limitations.*—Actions to contest the validity and to resist and set aside the probate of a will are purely statutory, and must be brought within the time and upon the grounds prescribed by the statute authorizing such actions. The right to contest is not extended or limited by the general statute of limitations contained in the code of civil procedure. *Ib.*
8. *Foreign Will. — Contest. — Statute Construed.*—When a foreign will devising land in this State is admitted to probate, or filed and recorded, any person interested in the estate of the testator, as provided by section 2770, Burns' R. S. 1894, may contest the same within the time prescribed. *Harris v. Harris*, 61 Ind. 117, overruled. *Ib.*
9. *Probate of Foreign Will. — Petition Not Necessary.*—Under section 2768, Burns' R. S. 1894, providing that a copy of a foreign will and the probate thereof may be produced, by any person interested, to the circuit court of the county in which there is any real estate on which the will may operate, a petition is not essential to the jurisdiction of the court. *Ib.*
10. *Probate of Foreign Will. — Jurisdiction.*—An order of a circuit court directing a foreign will or the probate thereof to be filed and recorded as provided by section 2768, Burns' R. S. 1894, implies the finding of such facts as are necessary to give the court jurisdiction. *Ib.*

**WITNESSES**—Inquiry as to reputation of a witness not confined to present residence, see EVIDENCE, 5; *Hauk v. State*, 238.

**WOMAN SUFFRAGE**—Under the constitution of the State the right of suffrage is not given to women, see ELECTIONS, 6, 7, 8; *Gougar v. Timberlake et al.*, 38.

*Ex. p. 11.*



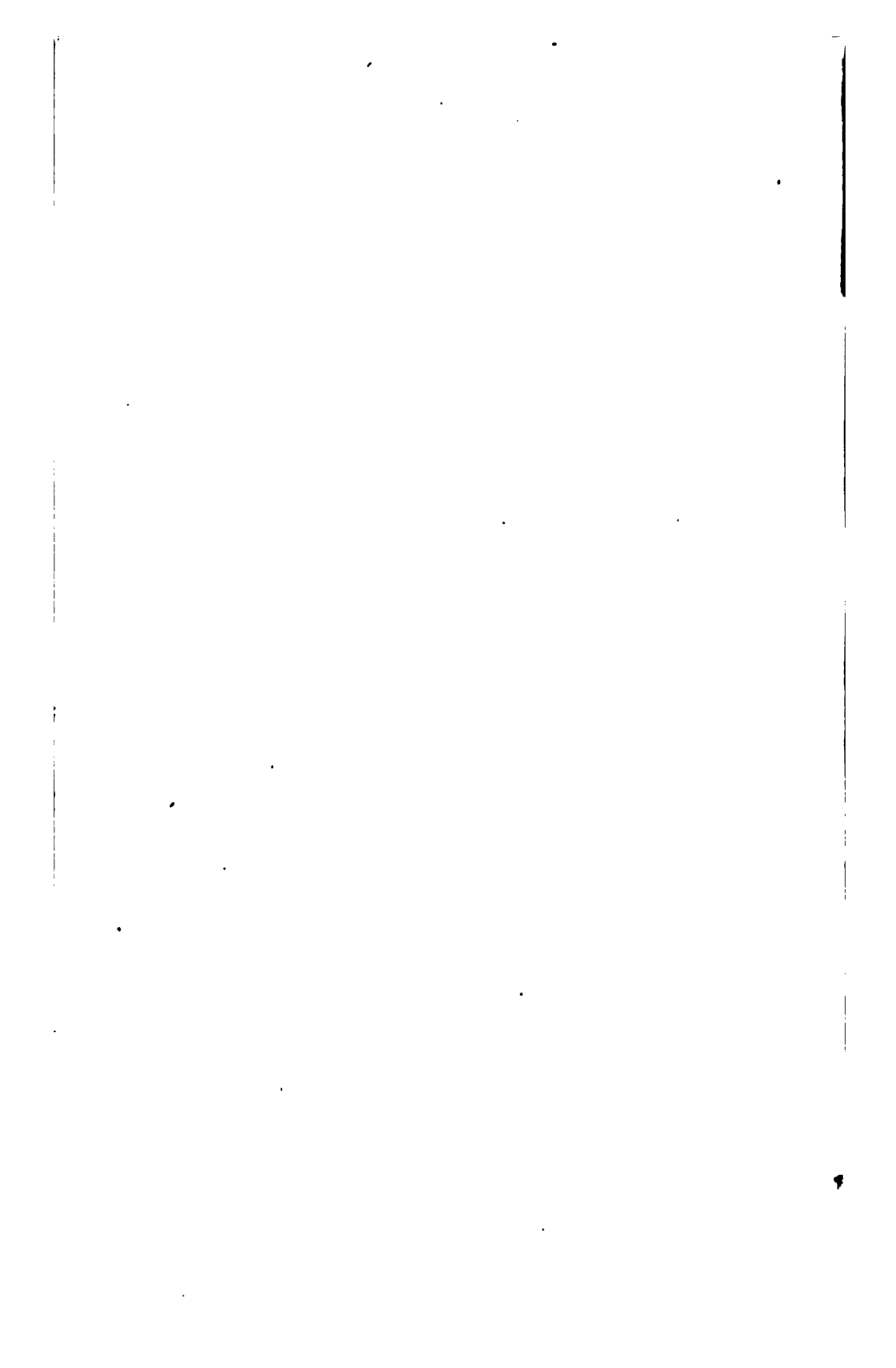




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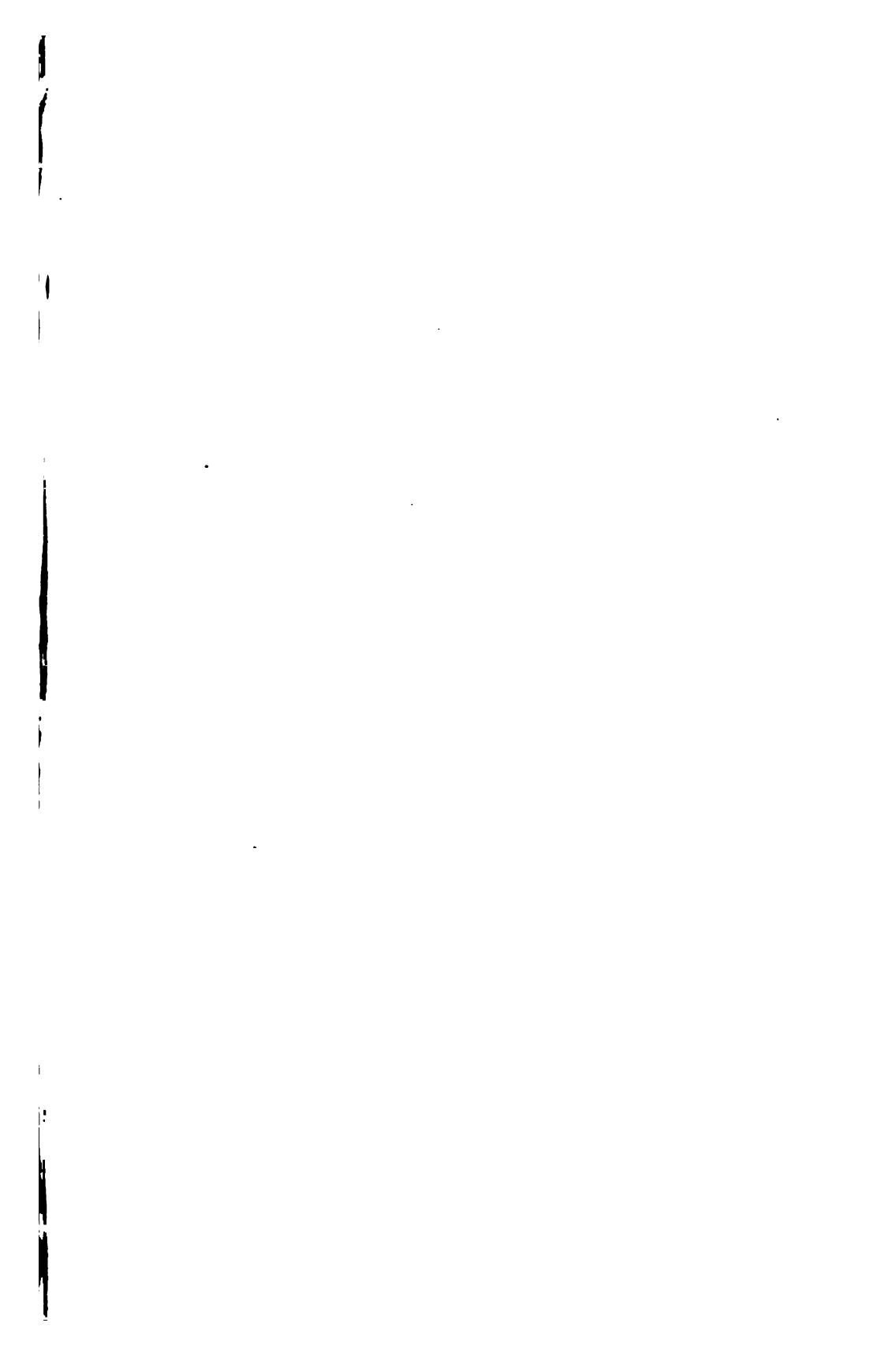
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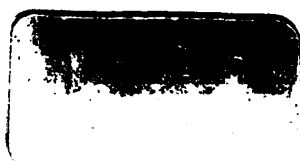
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**PRINCIPAL AND SURETY—**

**Mortgages.**—Where sureties on a note executed by a mining company to a bank, made payments on such note, and renewal notes signed by all of the parties were given to the bank for the balance due, and a note executed by the principal to each surety for the amount paid by him, such payments will not be treated as loans to the principal, but as payments on the note upon which they were sureties and are covered by a mortgage given by the principal, to indemnify them as such sureties.

*Bray, Admr., et al. v. First Avenue, etc., Co. et al., 599.*

**QUIETING TITLE—**

**Disclaimer of Title.**—*New Trial as of Right.*—*Statute Construed.*—

Where, in an action for possession, and to quiet title to real estate and for damages for the wrongful detention thereof, under section 1062 *et seq.*, Burns' R. S. 1894, the defendant files a disclaimer of any estate or interest in the land, it was error to grant to plaintiff a new trial as of right under section 1076, Burns' R. S. 1894, as it was not the intention of said section to extend such right where the issue and judgment involved but the naked question of possession, with or without damages, and where title was not in question.

*Thompson v. Kreisher, 573.*

**RAILROAD CROSSING**—When person attempting to cross tracks guilty of contributory negligence, see CONTRIBUTORY NEGLIGENCE; *Sutherland v. Cleveland, etc., R. R. Co., 308.*

1. **Duty of Managers of Train Approaching a Crossing.**—When means are not provided by which a collision at a railroad crossing is rendered impossible, the rule to stop, look, and listen is not less imperative on a train approaching a crossing of another railroad than upon a traveler about to approach a railroad crossing.

*Cleveland, etc., R. W. Co. v. Gray, 266.*

2. **Signal Lights.**—The fact that signal lights, in a railroad crossing signal system, were obscured from view by a car standing across defendant's track did not excuse defendant company from the duty of stopping its trains to ascertain whether or not the crossing was clear. *Ib.*

8. **Obstruction of Signal Lights.**—That the view of the crossings of two railroads, and of the signals designed to warn a train on one track of the presence of a train on the other was obscured by an electric light maintained by the city will not relieve the company from liability for a collision between a train standing upon the crossing and another train approaching on the other track, as it is bound to exercise care commensurate with the surroundings. *Ib.*

**RAILROADS**—May contract as private carriers, see CARRIERS, 1; *Pittsburgh, etc., R. W. Co. v. Mahoney, Admr., 196.*

**Depot and Grounds.**—**Hack Stands.**—Railroad companies have the right to make and enforce reasonable rules and regulations in regard to their stations and grounds, and may designate the stand that hacks and omnibuses shall occupy on such grounds.

*Lucas et al v. Herbert, et al., 64.*

**REAL ESTATE**—Disposition of by will, governed by the law of the State where the land is situated, see WILLS, 4; *Evansville, etc., Co. et al. v. Winsor, by Next Friend, 682.*

**REAL ESTATE BROKER**—As to contract authorizing agent to find a purchaser for, but not to sell real estate, see PRINCIPAL AND AGENT, 1; *Campbell v. Galloway et al., 440.*

When principal not bound by statement made by agent, see **PRINCIPAL AND AGENT**, 2; *Noftsgcr v. Barkdoll et al.*, 531.

**RECEIVERS**—A mechanic's lien is not affected by the appointment of a receiver for the property, and upon the sale of the property the lien attaches to the proceeds of the sale, see **MECHANIC'S LIEN**, 1; *Totten & Hogg, etc., Co. v. Muncie Nail Co. et al.*, 372.

**RECORDS**—

*Correction of, by nunc pro tunc Entry.*—It is competent for any tribunal to correct its record so as to make it speak the truth.  
*Everett et al. v. Deal et al.*, 90.

**REFORMATION OF INSTRUMENT**—As to the sufficiency of evidence to show mutual mistake in the execution of a lease.  
*Habbe v. Viele*, 116.

**RELEASE**—By employe of an express company of all liability for injuries sustained by the negligence of the employer or otherwise, includes injuries received from the railroad company, see **MASTER AND SERVANT**, 8; *Pittsburgh, etc., R. W. Co. v. Mahoney, Admr.*, 196.

**REMONSTRANCE**—The only pleading authorized on behalf of the remonstrators against the granting of a license to sell intoxicating liquors, see **INTOXICATING LIQUORS**, 9, 10; *Head et al. v. Doehleman*, 145.

**REPUTATION**—Inquiry as to reputation of a witness not confined to present residence, see **EVIDENCE**, 5; *Hauk v. State*, 238.

**SCHOOLS**—A school trustee who is elected as his own successor, and who before entering upon his duties took the oath of office, and who, upon the organization of the board is elected president, does not vacate the office by failure to file bond within ten days, see **OFFICERS**; *Koerner v. State, ex rel. Judy*, 158.

*Unexpended Balance of Tuition Fund.—Order of Payment.—Mandamus.—Statutes Construed.*—Under the provision of section 5750, Burns' R. S. 1894, all tuition funds in the hands of a township trustee or school treasurer are, in effect, but one fund, and by the provision of section 5956, Burns' R. S. 1894, are to be applied and expended in the same manner; and it cannot be held, in a mandamus proceeding, under section 5968, Burns' R. S. 1894, to compel the treasurer of a school corporation to pay over to the county treasurer an unexpended balance of school tuition revenue in excess of \$100.00, apportioned to such school corporation by the State, that the treasurer first paid out to his teachers the funds received from the State, and then those derived from local sources.

*Pfau, Treas., etc., v. State, ex rel. Ketcham, etc.*, 539.

**SEWERS**—The word "drainage," as used in section 8598, Burns' R. S. 1894, providing for the drainage of cities, includes "sewerage," see **DRAINS**, 2, 8; *City of Valparaiso v. Parker et al.*, 379.

**SPECIAL FINDINGS**—Where facts found are inconsistent, see **MALICIOUS PROSECUTION**, 8; *Terre Haute, etc., R. R. Co. v. Mason*, 578.